DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-192
Title: United States, Petitioner
v.
James X. Bormes
Docketed: August 16, 2011
Linked with 10A1172
Lower Ct: United States Court of Appeals for the Federal Circuit
Case Nos.: (2009-1546)
Decision Date: November 16, 2010
Rehearing Denied: March 15, 2011

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jun 2 2011	Application (10A1172) to extend the time to file a petition for a writ of certiorari from June 13, 2011 to July 13, 2011, submitted to The Chief Justice.
Jun 3 2011	Application (10A1172) granted by The Chief Justice extending the time to file until July 13, 2011.
Jul 1 2011	Application (10A1172) to extend further the time to file a petition for a writ of certiorari from July 13, 2011 to August 12, 2011, submitted to The Chief Justice.
Jul 1 2011	Application (10A1172) granted by The Chief Justice extending the time to file until August 12, 2011.
Aug 12 2011	Petition for a writ of certiorari filed. (Response due September 15, 2011)
Sep 28 2011	DISTRIBUTED for Conference of October 14, 2011.
Oct 6 2011	Response Requested. (Due November 7, 2011)
Oct 19 2011	Order extending time to file response to petition to and including December 7, 2011.
Dec 7 2011	Brief of respondent James X. Bormes in opposition filed.
Dec 21 2011	DISTRIBUTED for Conference of January 13, 2012.
Dec 22 2011	Reply of petitioner United States filed. (Distributed)
Jan 13 2012	Petition GRANTED.
Feb 17 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including April 13, 2012.
Mar 9 2012	Motion to dispense with printing the joint appendix filed by petitioner the United States.
Apr 2 2012	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Apr 13 2012	Brief of petitioner the United States filed.
May 4 2012	The time to file respondent's brief on the merits is extended to and including July 3, 2012.
Jul 3 2012	Brief of respondent James X. Bormes filed.
Jul 23 2012	SET FOR AGRUMENT ON Tuesday, October 2, 2012

Jul 24 2012	CIRCULATED.
Jul 31 2012	Record received from U.S.C.A. for Federal Circuit. (1 envelope)
Aug 2 2012	Reply of petitioner the United States filed. (Distributed)
Aug 22 2012	Record from U.S.D.C. for Northern District of Illinois is electronic.
Oct 2 2012	Argued. For petitioner: Sri Srinivasan, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondent: John G. Jabobs, Chicago, Ill.

PETITION FOR WRIT OF CERTIORARI

No. 11-192

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES X. BORMES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Little Tucker Act, 28 U.S.C. 1346(a)(2), waives the sovereign immunity of the United States with respect to damages actions for violations of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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JAMES X. BORMES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 626 F.3d 574. The court of appeals' denial of the government's motion to transfer the appeal to the Seventh Circuit (App., *infra*, 18a-22a) is not published in the Federal Reporter, but is available at 2010 WL 331771. The opinion of the district court (App., *infra*, 23a-30a) is reported at 638 F. Supp. 2d 958.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2010. A petition for rehearing was denied

on March 15, 2011 (App., *infra*, 31a-32a). On June 3, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 13, 2011. On July 1, 2011, the Chief Justice further extended the time to August 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Little Tucker Act, 28 U.S.C. 1346(a)(2), provides, subject to certain exceptions not relevant here:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of * * * [a]ny * * * civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The general Tucker Act, 28 U.S.C. 1491(a)(1), provides in relevant part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Relevant provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, are reproduced in the appendix to this petition. App., *infra*, 33a-79a.

STATEMENT

1. Respondent is an attorney who, according to the allegations in his complaint, filed a lawsuit on behalf of one of his clients in the United States District Court for the Northern District of Illinois in August 2008. App., *infra*, 86a. He paid the $350 filing fee with his own American Express credit card. *Ibid.* The transaction was processed through the federal government's pay.gov system, which dozens of federal agencies use to process online credit- and debit-card payment transactions. *Id.* at 85a-86a. Respondent alleges that he received from this government website a "confirmation webpage that was displayed on his computer screen," as well as an e-mail confirmation, both of which contained the expiration date of his credit card. *Id.* at 87a.

Respondent then filed this putative class action, also in the United States District Court for the Northern District of Illinois, alleging that the government's electronic transaction confirmations did not comply with the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681, *et seq.* App., *infra*, 2a. FCRA is a consumer-protection statute that regulates the collection, dissemination, and use of information related to a consumer's finances and creditworthiness. See *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001). One of FCRA's substantive provisions, added in 2003, prohibits a "person" that "accepts credit cards or debit cards for the transaction of business" from "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. 1681c(g)(1); see Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1959. Respondent claimed that the government had violated that provision; that it had done so "willfully"; and

that, as a result, he and a class of thousands of similarly situated persons were entitled to recovery under 15 U.S.C. 1681n (2006 & Supp. III 2009). App., *infra*, 91a-97a. Section 1681n provides, as relevant here, that "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for statutory damages of $100 or actual damages of up to $1000, potential punitive damages, and attorney fees and costs. 15 U.S.C. 1681n(a).

The district court dismissed the suit. App., *infra*, 23a-30a. The court explained that "[t]he well-established doctrine of sovereign immunity protects the United States from suit except where Congress has 'unequivocally expressed' a waiver of immunity." *Id.* at 27a-28a (quoting *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992)). Respondent pointed to FCRA's general definition of "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity," 15 U.S.C. 1681a(b), and argued that Section 1681n's imposition of damages liability on any "person" necessarily included the United States. App., *infra*, 28a. The district court disagreed, observing that "other federal statutes have unequivocally waived the United States' sovereign immunity by expressly inserting the specific term 'United States' into the statutory language." *Ibid.*; see *id.* at 28a-29a (citing the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1), and the Quiet Title Act, 28 U.S.C. 2409a(a)). The district court further observed that "a separate section of the FCRA expressly provides that the United States may be liable for certain violations." *Id.* at 29a; see 15 U.S.C. 1681u(i) (imposing liability on "[a]ny agency or department of the

United States" for certain actions relating to law-enforcement investigations). The district court concluded that Section 1681n, by contrast, "has not so unequivocally waived the sovereign immunity of the United States." App., *infra*, 29a.

2. Respondent appealed to the Federal Circuit. App., *infra*, 19a. His asserted justification for appealing to the Federal Circuit, rather than the regional Seventh Circuit, was 28 U.S.C. 1295(a)(2). App., *infra*, 92a. Under that provision, the Federal Circuit has exclusive jurisdiction "of an appeal from a final decision of a district court of the United States * * * if the jurisdiction of that court was based, in whole or in part, on" the Little Tucker Act, 28 U.S.C. 1346(a)(2).

In the district court, respondent's complaint had alleged multiple bases of jurisdiction over his suit. App., *infra*, 82a. One was FCRA's own jurisdictional provision, 15 U.S.C. 1681p, which provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction." Another asserted basis of jurisdiction was the Little Tucker Act, which provides that, subject to certain exceptions, "district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims," of a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1346(a)(2). The Little Tucker Act is an adjunct to the general Tucker Act, 28 U.S.C. 1491(a)(1), which

provides that the same set of claims may be brought in the United States Court of Federal Claims, whether or not the plaintiff seeks more than $10,000. See, *e.g.*, *United States* v. *Sherwood*, 312 U.S. 584, 591 (1941) (substantive scope of Little Tucker Act and Tucker Act are identical). The district court had not resolved the question whether the Little Tucker Act can provide the basis for jurisdiction over a FCRA suit. App., *infra*, 26a n.1; see *id.* at 3a.

The government moved to transfer respondent's appeal to the Seventh Circuit. App., *infra*, 19a. The government argued that, to the extent a FCRA suit against the United States would be permissible at all, the proper jurisdictional basis would be FCRA's own specific jurisdictional provision, 15 U.S.C. 1681p, and not the more general jurisdictional provision in the Little Tucker Act. App., *infra*, 20a-21a. The relevant statute governing an appeal therefore would not be 28 U.S.C. 1295(a)(2), but instead 28 U.S.C. 1291, which would assign the appeal to the appropriate regional circuit (in this case, the Seventh Circuit), rather than the Federal Circuit. App., *infra*, 21a.

The Federal Circuit, finding the issue "close," denied the government's motion to transfer. App., *infra*, 18a-22a.

3. A merits panel of the Federal Circuit subsequently vacated the district court's decision and reinstated respondent's FCRA claim. App., *infra*, 1a-17a. Unlike the district court, the Federal Circuit declined to consider whether there is an express and unequivocal waiver of the United States' sovereign immunity in FCRA itself. *Id.* at 14a. The court instead applied a "less stringent" standard. *Ibid.*

a. The court of appeals believed that even if FCRA did not itself expressly waive the United States' sovereign immunity, the Little Tucker Act and the general Tucker Act could independently supply such a waiver. App., *infra*, 7a. The panel noted that the Little Tucker Act and Tucker Act not only supply district-court or Court of Federal Claims jurisdiction over certain categories of claims, but also waive the United States' sovereign immunity with respect to those categories of claims. *Id.* at 6a-7a. The panel concluded from that premise that the sovereign-immunity issue in this case could be resolved simply by reexamining the question that had been tentatively addressed by the motions panel as a threshold jurisdictional matter—namely, whether FCRA suits fall within the type of claims covered by the Little Tucker Act. *Ibid.*

In the panel's view, the applicable mode of analysis for this case could be extrapolated from *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003), a case in which this Court had analyzed whether an Indian tribe had a cause of action based on a statute governing the use of property held in trust for the tribe. The right question to ask in this case, the court believed, was whether, treating the Little Tucker Act as the requisite waiver of sovereign immunity, FCRA "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." App., *infra*, 7a (quoting *White Mountain Apache Tribe*, 537 U.S. at 472). The panel emphasized that this test "demands a showing 'demonstrably lower' than the initial waiver of sovereign immunity." *Ibid.* (quoting *White Mountain Apache Tribe*, 537 U.S. at 472). "It is enough," the panel stated, "that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a

right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' . . . a fair inference will do." *Ibid.* (quoting *White Mountain Apache Tribe*, 537 U.S. at 473).

b. The government objected to that mode of analysis, contending that it would be improper to rely on the Little Tucker Act to circumvent the requirement that FCRA itself unequivocally waive sovereign immunity. The government did not dispute the basic premise that, with respect to certain kinds of damages claims, the Tucker Act both grants jurisdiction and waives sovereign immunity. But the government asserted that FCRA was not the kind of statute as to which the Tucker Act had ever been understood to apply.

Observing that FCRA already contains its own specific remedial scheme, the government contended that it would be inappropriate to supplant Congress's specific consideration of FCRA remedies with the more general provisions of the Tucker Act. App., *infra*, 10a, 15a-16a. The government additionally pointed to a number of specific inconsistencies between FCRA and the Tucker Act. First, FCRA allows all suits to be brought in district court (see 15 U.S.C. 1681p), whereas the Tucker Act's sovereign-immunity waiver (for suits seeking over $10,000) is contingent on filing in the Court of Federal Claims (see 28 U.S.C. 1491(a)(1)). App., *infra*, 11a-14a. Second, FCRA "provides for punitive and criminal punishment, which cannot be imposed upon the government under the Tucker Act." *Id.* at 14a. Third, FCRA "permits recovery for negligence, but the Tucker Act does not permit negligence claims." *Id.* at 15a. Fourth, FCRA's general two-year statute of limitations (see 15 U.S.C. 1681p) is shorter than the Tucker Act's

six-year statute of limitations (see 28 U.S.C. 2401(a), 2501). App., *infra*, 16a.

c. The Federal Circuit rejected the government's arguments and concluded that the Tucker Act and Little Tucker Act waive the United States' sovereign immunity with respect to suits alleging violations of FCRA, even if FCRA itself does not contain the requisite waiver. App., *infra*, 7a-16a. The government had acknowledged at oral argument that FCRA's general definition of "person" in 15 U.S.C. 1681a(b), which includes "any * * * government," includes the United States for some purposes. App., *infra*, 10a-11a; see Oral Argument Recording, No. 2009-1546, at 14:18-16:15, 18:40-19:07 (Fed. Cir. Aug. 2, 2010). The Federal Circuit panel reasoned from this that a "fair interpretation" of the term "person" in the particular context of 15 U.S.C. 1681n—which allows a "person" to be sued for damages (including statutory and punitive damages) for a willful violation of FCRA—would also include the United States. App., *infra*, 11a.

The court declined to reach the question whether this reasoning would be sufficient to find "an 'express' waiver of sovereign immunity in FCRA" itself. App., *infra*, 14a. But the court deemed this reasoning sufficient under the "less stringent" test it applied, *ibid.*, and reinstated respondent's complaint on that basis, *id.* at 1a.

4. The Federal Circuit denied rehearing en banc. App., *infra*, 31a-32a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit erred in concluding that the United States can be sued for damages for alleged violations of FCRA. FCRA is a self-contained statute of gen-

eral applicability with its own detailed remedial scheme. Had Congress intended to subject the United States to damages under FCRA, it would have made that clear in FCRA itself. But Congress did not do so. FCRA does not satisfy the "critical requirement" that a "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Lane* v. *Peña*, 518 U.S. 187, 192 (1996). And that critical requirement cannot be circumvented or watered down by relying on the general terms of the Tucker Act rather than on FCRA's own specific remedial provisions. The Tucker Act supplies an autonomous remedial scheme for certain types of statutes that do not themselves expressly address questions of remedy. It neither supersedes, nor provides a distorting lens through which to view, another statute's own organic remedial scheme. That is particularly so here, because FCRA's remedial scheme directly conflicts with the Tucker Act.

This Court should grant certiorari to review the Federal Circuit's erroneous decision. The Federal Circuit's decision conflicts with decisions of this Court recognizing limitations on the Tucker Act; significantly expands the jurisdiction of the Federal Circuit, and of the Court of Federal Claims and district courts, under the Tucker Acts; and invites circumvention of other comprehensive statutory schemes. In addition, under FCRA alone, the Federal Circuit's decision opens the door to vast potential federal liability. FCRA is a far-reaching consumer-protection statute that imposes a wide range of duties on employment-related and lending-related activities—activities in which the federal government broadly engages. The Federal Circuit's decision would impose liability on the government for not only willful, but also negligent, violations of those provisions. See 15 U.S.C.

1681*o*. Plaintiffs across the country would be able to take advantage of the decision, because the Federal Circuit has nationwide jurisdiction over appeals in all suits arising under the Tucker Act or Little Tucker Act. 28 U.S.C. 1295(a)(2) and (3). There is no reasonable prospect that the Federal Circuit, which denied rehearing in this case, will change its mind on the question presented. This Court's intervention is therefore necessary.

A. The Tucker Act And Little Tucker Act Do Not Waive The United States' Sovereign Immunity With Respect To FCRA Claims

The Federal Circuit's conclusion that the Tucker Act or Little Tucker Act can supply a sovereign-immunity waiver for a claim brought pursuant to FCRA's remedial provisions has three critical flaws. First, the Tucker Acts do not apply to statutes that, like FCRA, have their own self-contained remedial schemes. Second, even assuming the Tucker Acts could ever apply to such a statute, conflicts between FCRA and the Tucker Acts demonstrate that they would not apply to FCRA in particular. Third, the Federal Circuit's decision fails even on its own terms, because not only does FCRA lack the requisite unequivocal waiver of the United States' sovereign immunity to damages actions, but also FCRA cannot "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." App., *infra*, 7a (citations omitted).

1. a. The Tucker Act and Little Tucker Act are designed as autonomous remedial provisions for the vindication of certain substantive rights as to which no complete damages remedy has otherwise been provided. Originally enacted in 1886, the Tucker Act evolved from congressional efforts to provide a judicial remedy for

damages against the United States in circumstances in which it otherwise would have been necessary for Congress to pass a specialized bill to give redress to an aggrieved person. See *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). The Tucker Act and Little Tucker Act supply a basis for jurisdiction and a waiver of sovereign immunity for such claims. See 28 U.S.C. 1346(a)(2), 1491(a)(1); see, *e.g.*, *Mitchell*, 463 U.S. at 215. Associated provisions supply a statute of limitations for those claims. See 28 U.S.C. 2401(a), 2501(a).

In keeping with the Tucker Act's design and purpose, this Court has repeatedly held that statutes with their own specific enforcement schemes are not separately enforceable in a suit for monetary compensation under the Tucker Act. For example, in *United States* v. *Fausto*, 484 U.S. 439 (1988), the Court concluded that a federal employee could not maintain a Back Pay Act suit against the United States under the Tucker Act. The Court emphasized that the "comprehensive and integrated" review provisions of the Civil Service Reform Act separately provided for administrative and judicial review of back pay claims against the federal government. *Id.* at 454. Similarly, in *Brown* v. *General Services Administration*, 425 U.S. 820, 834 (1976), the Court held that a claim based on alleged employment discrimination by a federal agency could not be brought against the United States under the Tucker Act. The Court relied in part on legislative history indicating congressional intent that Title VII supply the only remedy, but also stressed the "balance, completeness, and structural integrity" of the Title VII remedy, and the principle that "a precisely drawn, detailed statute pre-empts more general remedies." *Id.* at 828-834.

The Court has applied that same principle in other Tucker Act cases, including recently in *Hinck* v. *United States*, 550 U.S. 501 (2007). In *Hinck*, the Court held that a suit to abate interest on federal taxes could be brought only in the Tax Court under a special provision of the Internal Revenue Code, and not under the Tucker Act. *Id.* at 506-507. The Court observed that the Internal Revenue Code provision already "provide[d] a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief." *Id.* at 506; see also, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (holding that Medicare reimbursement disputes are governed by the "precisely drawn provisions" of the Medicare statute rather than the Tucker Act).

The specific-governs-the-general principle dictates the outcome of this case as well. As was the case in *Hinck*, FCRA has its own "precisely drawn, detailed" remedial scheme that "provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief." 550 U.S. at 506. FCRA's jurisdictional provision, 15 U.S.C. 1681p, specifies both a forum for adjudication ("in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction") and a statute of limitations (the earlier of five years after the violation or two years after its discovery by the plaintiff). The civil-remedies provisions, 15 U.S.C. 1681n and 1681*o*, identify a class of potential plaintiffs ("consumer[s]"), a standard of review (the state of mind, namely, willfulness or negligence, necessary for liability to attach), and authorization for judicial relief (actual, statutory, and/or punitive damages, plus fees and costs).

FCRA's specific, self-contained scheme accordingly "pre-empts more general remedies" like the Tucker Act and Little Tucker Act. *Hinck*, 550 U.S. at 506. When it comes to FCRA, there is simply no room for the Tucker Act's autonomous remedial provisions.

It is no answer to say that the Tucker Act supplements FCRA's remedial provisions by supplying a sovereign-immunity waiver that FCRA itself does not contain. It was equally true in other cases discussed above that the Tucker Act might have allowed plaintiffs to avoid some limitation in the self-contained remedial scheme. See, *e.g.*, *Hinck*, 550 U.S. at 509 (specific remedial statute restricted class of plaintiffs eligible to seek relief); *Brown*, 425 U.S. at 824 (specific remedial statute required suit within 30 days of final agency action). The Court has disallowed Tucker Act remedies in such cases precisely *because* they would circumvent applicable limitations. In *Hinck*, for example, the petitioners argued that they could rely on the substance of the specific tax statute at issue (which allowed for abuse-of-discretion review of certain agency decisions) while importing the Tucker Act for other remedial purposes. 550 U.S. at 506. The Court rejected that effort, explaining that "[w]e cannot accept the Hincks' invitation to isolate one feature of this 'precisely drawn, detailed statute'—the portion specifying a standard of review—and use it to permit taxpayers to circumvent the other limiting features Congress placed in the *same* statute." *Id.* at 507.

The Federal Circuit in this case engaged in the same sort of mixing and matching that the Court rejected in *Hinck*. It relied on the substance of 15 U.S.C. 1681n, which allows damages claims for willful violations of FCRA, while invoking the Tucker Act to remove any sovereign-immunity limitation on that provision's scope.

App., *infra*, 10a-11a, 14a. This Court has made clear, however, that the Tucker Act cannot be employed to create such hybrid suits and remedies.

b. The Federal Circuit's methodology threatens to undermine this Court's well-established sovereign-immunity jurisprudence. When a plaintiff attempts to sue the government under a generally applicable civil-remedy statute like 15 U.S.C. 1681n, the well-established analytical framework focuses on whether that statute itself contains the requisite unequivocal waiver of the federal government's sovereign immunity. In *Lane* v. *Peña*, for example, a plaintiff sought to sue the federal government for a violation of Section 504(a) of the Rehabilitation Act. 518 U.S. at 191. This Court analyzed the Rehabilitation Act, found no unambiguous waiver of federal sovereign immunity in the statute's text, and consequently affirmed the dismissal of the suit. *Id.* at 190-200.

The outcome of *Lane* and similar cases should not change simply because a plaintiff, like respondent here, seeks to invoke the Little Tucker Act or the Tucker Act as a basis for jurisdiction. Cf. *Brown*, 425 U.S. at 833 ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."). The Federal Circuit cited no case, and we are aware of none, in which this Court has applied a "less stringent" "fair interpretation" rule, App., *infra*, 7a, 14a, to find the United States liable for damages under the remedial provisions of a generally applicable statute that does not itself unequivocally waive the sovereign immunity of the United States. Instead, as illustrated by the case primarily relied upon by the Federal Circuit here—*United States* v. *White Mountain Apache Tribe*,

537 U.S. 465 (2003) (cited at, *e.g.*, App., *infra*, 7a)—the "fair interpretation" rule is applied in a very different context.

White Mountain Apache Tribe did not involve a statute of general applicability or a statute with its own remedial scheme. Rather, the statute in that case, which stated that the United States would hold certain land in trust for an Indian tribe, unambiguously applied *only* to the United States and said nothing about remedies. 537 U.S. at 468-469. The issue in the case was whether Congress would have wanted the remedial scheme of the Indian Tucker Act (28 U.S.C. 1505), which waives sovereign immunity to certain monetary claims by Indian tribes, to provide damages if the government failed to carry out the duties imposed by the statute. *White Mountain Apache Tribe*, 537 U.S. at 468-469. In other words, the question was whether any remedial scheme for damages at all should apply to the statute providing for the particular Indian property to be held in trust by the United States. It was to answer that question that the Court analyzed whether the particular Indian statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 472 (citation omitted).

By choosing to apply that test to this case, the Federal Circuit picked the wrong tool for the job. The question here is not whether FCRA calls for a remedial scheme—it already has one of its own. The question in this case therefore should be whether that FCRA scheme itself provides an unambiguous waiver of sovereign immunity to suit against the United States. The test drawn from *White Mountain Apache Tribe*—whether a statute that applies only to the United States can in turn fairly be interpreted to contemplate the pay-

ment of compensation in the event of a violation—does not help to answer that question, because it is not the test for finding a waiver of sovereign immunity. The Federal Circuit fundamentally erred in treating the standard drawn from *White Mountain Apache Tribe* as simply a "less stringent" (App., *infra*, 14a) substitute for the traditional rule that a comprehensive statute must itself clearly and unequivocally waive the United States' sovereign immunity to damages actions.

2. Even assuming, however, that the Tucker Act could, in theory, be grafted onto another statute's existing, self-contained remedial scheme, that operation would be impossible here. The Tucker Act conflicts in a number of critical ways with FCRA.

a. To begin with, FCRA's own jurisdictional provision, 15 U.S.C. 1681p, directs plaintiffs to different courts than the Tucker Act does. Section 1681p specifically provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction." Under the plain language of the statute, any action cognizable under FCRA is one that can be brought in district court.

The Tucker Act, in contrast, does not allow all monetary claims against the United States covered by the Act to be brought in district court. The Tucker Act provides that "[t]he United States Court of Federal Claims shall have jurisdiction" over the types of damages claims it covers. 28 U.S.C. 1491(a)(1). The Little Tucker Act allows those same types of claims also to be brought in district court, but only when the plaintiff seeks no more than $10,000. 28 U.S.C. 1346(a)(2). For a claim of more

than $10,000, the Court of Federal Claims (CFC) is the only place a plaintiff may go.

These conflicting jurisdictional directives cannot be reconciled. The Federal Circuit believed that the provisions could be harmonized simply by considering the CFC to be a "court of competent jurisdiction" in which Section 1681p would authorize suit. App., *infra*, 12a. But that does not solve the problem. Section 1681p provides that a plaintiff can file any FCRA claim in district court "*or* in any *other* court of competent jurisdiction" (emphasis added). It therefore presumes that the district court is itself *always* competent to adjudicate a FCRA claim. It does not contemplate that other, unspecified federal courts, such as the CFC, might award damages that are unavailable in district court. The reference to "other court[s] of competent jurisdiction" simply ensures that FCRA claims may be brought in state court in addition to federal district court. See *Bank One Chicago, N.A.* v. *Midwest Bank & Trust Co.*, 516 U.S. 264, 268 (1996) (describing similarly worded statute as "provid[ing] for concurrent federal-court and state-court jurisdiction").

b. Allowing a FCRA action against the United States to proceed under the Tucker Act would be improper for the additional reason that FCRA suits fall outside the class of claims covered by the Tucker Act to begin with. FCRA's primary civil-remedies provisions, which provide damages for FCRA violations committed "willfully" (15 U.S.C. 1681n) or "negligent[ly]" (15 U.S.C. 1681o), define statutory claims sounding in tort. See *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57, 69 (2007) (construing Section 1681n by reference to tort treatises); *Bigby* v. *United States*, 188 U.S. 400, 408 (1903) ("Causing harm by negligence is a tort."). But

the Tucker Act has never permitted claims against the United States "sounding in tort." 28 U.S.C. 1346(a)(2), 1491(a)(1); see, *e.g.*, *United States* v. *Tohono O'odham Nation*, 131 S. Ct. 1723, 1729 (2011) (describing Tucker Act as a "general waiver of sovereign immunity for non-tort claims for monetary relief"); *United States* v. *Hohri*, 482 U.S. 64, 66 n.1 (1987) (describing Little Tucker Act and Tucker Act jurisdiction as "limited to nontort claims"); *Bigby*, 188 U.S. at 403 ("It is clear that the act excludes from judicial cognizance any claim against the United States for damages in a case 'sounding in tort.'").

The Federal Circuit attempted to bridge this gap, at least with respect to negligence suits under Section 1681*o*, by positing a difference between "a negligence claim" (which, it conceded, would not be covered by the Tucker Act) and "a statutory claim that includes an element which is analyzed under a negligence standard" (which, in its view, would be allowable under the Tucker Act). App., *infra*, 15a. But this Court has drawn no distinction between statutory and nonstatutory torts in this context. The Court held in *Schillinger* v. *United States*, 155 U.S. 163 (1894), for example, that a claim for patent infringement was barred under the Tucker Act as one "sounding in tort," notwithstanding a federal statutory cause of action for patent infringement. *Id.* at 169 (citing Rev. Stat. § 4919 (1870)).

Moreover, Congress has enacted a separate statute, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), which waives the United States' sovereign immunity for claims based on torts committed by a federal officers and employees. But the FTCA provides for liability only if the United States, if a private person, would be liable under *state* law. 28 U.S.C. 1346(b)(1).

Torts based on asserted violations of federal statutes are not covered. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 477-478 (1994). That limitation cannot be circumvented by bringing an action under the Tucker Act, which has never applied to cases sounding in tort.

c. FCRA and the Tucker Act conflict in other relevant respects as well. For one thing, a plaintiff suing for a willful violation of FCRA may seek punitive damages. 15 U.S.C. 1681n(a)(2). But, as the Federal Circuit acknowledged, the Tucker Act allows an award only of compensatory damages. App., *infra*, 14a (citing *Brown* v. *United States*, 105 F.3d 621, 623 (Fed. Cir. 1997)). The Federal Circuit accordingly decided that it would recognize only those FCRA claims that (as is the case with the complaint here) do not seek punitive damages. *Id.* at 15a; see *id.* at 96a. But the difference in the types of remedies available under FCRA (as opposed to the Tucker Act) illustrates why Congress could not have intended the latter to be a basis for asserting whatever FCRA damages claims might lie against the United States.

That point is further illustrated by differences in the two remedial schemes' limitations periods. FCRA claims are cabined by a distinct statute of limitations, and must be asserted no later than two years after the date of the discovery of the violation that is the basis of liability, or five years after the date on which the violation occurs, whichever date is earlier. 15 U.S.C. 1681p(1) and (2). Tucker Act and Little Tucker Act suits, in contrast, are governed by six-year statute of limitations. See 28 U.S.C. 2401(a), 2501. This Court has viewed differences in limitations periods as an indication that a more specific remedial scheme should govern over the general. See, *e.g.*, *EC Term of Years Trust* v. *United*

States, 550 U.S. 429, 433-434 (2007) (rejecting reliance on more general remedial provision that would allow plaintiffs to "effortlessly evade" more specific statute's limitations period); *Brown*, 425 U.S. at 833 (similar).

The Federal Circuit dismissed this concern by noting that "different statutes of limitations are common in federal practice," and stating that "the rule is that the more specific limit prevails, not that a short limit cancels out any substantive statute." App., *infra*, 16a (internal quotation marks and citation omitted). But the Federal Circuit's citation of *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008), does not support that proposition. *Clintwood Elkhorn Mining* addressed a statute broadly specifying that "*[n]o suit* . . . shall be maintained in *any court* for the recovery of *any internal revenue tax* alleged to have been erroneously or illegally assessed" unless the taxpayer had complied with a two-year limitations period for filing an administrative claim. *Id.* at 7 (quoting 26 U.S.C. 7422(a)). The Court held that this universal statute of limitations would apply "whatever the source of the cause of action," and thus expressly declined to address the question whether the respondents' tax-refund suit in that case could be brought "directly under the Tucker Act." *Id.* at 9. Because the Court did not address whether the Tucker Act could have provided the respondents with a remedy, it had no occasion to address the principle—established in the other cases already discussed—that a remedial scheme more specific in its limitations period and other respects excludes a more general scheme altogether.

That principle prevents a court from superimposing the Tucker Act atop an existing remedial scheme, and it certainly prevents the mixed Tucker Act-FCRA scheme created by the Federal Circuit in this case. Congress

could not have intended a scheme that incorporates the Tucker Act's sovereign-immunity waiver while dispensing with its bar against tort suits and its statute of limitations, and incorporates FCRA's liability provisions while dispensing with its jurisdictional limitations and its provision for noncompensatory damages. This judicially created hybrid is at odds with both statutes, is supported by neither, and has no legitimate legal basis.

3. Finally, even assuming away the conflicts between the remedial schemes, and accepting for argument's sake the premise that the Tucker Act *might* apply, FCRA cannot "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." App., *infra*, 7a (citation omitted). FCRA contains no "unequivocal expression" of Congress's intent to waive the United States' sovereign immunity, *Lane*, 518 U.S. at 192 (citation omitted), nor would it satisfy the Federal Circuit's "less stringent" test for a Tucker Act waiver, App., *infra*, 14a.

The Federal Circuit's belief that the United States should be liable under FCRA's civil remedies provisions, 15 U.S.C. 1681n and 1681*o*, was premised entirely on the statutory definition of "person" in 15 U.S.C. 1681a(b) to include "any * * * government or governmental subdivision or agency." App., *infra*, 10a-11a. The government has acknowledged that the term "person" in some FCRA contexts could include the United States. *Ibid.* But the history and structure of FCRA demonstrate that Congress never intended the term "person" to include the United States in the context of civil-remedies provisions subjecting a "person" to damages liability. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 344 (1997) (interpretation of defined term can depend on context); *United States* v. *Public Utils. Comm'n*, 345 U.S. 295,

312-313 & n.20 (1953) (declining to apply statutory definition of "person" to particular section of Public Utility Act of 1935 in which term appeared); *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 764 (1949) ("[W]e have * * * consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended contexts.").

a. When Congress first enacted the definition of "person" in 15 U.S.C. 1681a(b), the definition did not have any effect of directly imposing liability on federal, state, or local governments. The definition dates back to the original passage of FCRA in 1970. See Act of Oct. 26, 1970, Pub. L. No. 91-508, § 601, 84 Stat. 1127, 1128 (1970 Act). As originally enacted, FCRA principally regulated "consumer reporting agencies"—entities that aggregate and disseminate personal information about consumers, which third parties use to determine a consumer's eligibility for credit, insurance, or employment, or for other enumerated purposes. *Id.* at 1129 (defining consumer reporting agency); *id.* at 1129-1133 (imposing substantive requirements on consumer reporting agencies); see 15 U.S.C. 1681a(f) (current statutory definition of "credit reporting agency"). The only requirements imposed directly upon "person[s]" related to the procurement of investigative consumer reports. 1970 Act, 84 Stat. 1130; see also *id.* at 1133 (suggesting that a "person" might also be subject to additional requirement if he used a consumer report). Consistent with its focus on credit reporting agencies, the damages provisions of the 1970 Act applied not to "persons" but to consumer reporting agencies and "user[s] of information." 1970 Act, 84 Stat. 1134. The choice of language in defining the term "person" therefore did not reflect an expectation that FCRA could be the basis for a damages claim

against the federal government (or a State, or a local government).

Indeed, Congress did not even intend the statutory definition of "person" to apply universally across the 1970 Act itself. The 1970 Act included a provision, still in FCRA today, subjecting "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses" to a fine of up to $5000 or imprisonment of up to one year. 84 Stat. 1134 (15 U.S.C. 1681q). Congress could not have intended the term "person" in the context of that criminal provision to include governments, especially the United States.

b. Twenty-six years after FCRA's enactment, the Consumer Credit Reporting Reform Act of 1996 significantly expanded the scope of FCRA to regulate persons who provide information to reporting agencies and persons who make use of credit reports. Pub. L. No. 104-208, §§ 2401 *et seq.*, 110 Stat. 3009-426. The Act, for example, prohibited persons from procuring certain consumer information for employment purposes except in enumerated circumstances and restricted the ways in which employers may use consumer credit information in taking employment actions. §§ 2403, 2411, 110 Stat. 3009-431, 3009-443 to -444 (15 U.S.C. 1681b(b)(2)-(3), 1681m(a)). The Act also modified the civil-remedies provisions to reflect the expanded scope of the statute beyond its original focus on consumer reporting agencies. In particular, it amended those provisions to apply to "person[s]" rather than just to consumer reporting agencies and users of information. See § 2412(a) and (d), 110 Stat. 3009-446.

In making that change, Congress did not refer to the 1970 Act's definition of "person," and nothing in the leg-

islative history of the 1996 Act suggests that Congress believed it was exposing governmental entities to significant new liabilities. The House Report on a prior version of the 1996 legislation noted only that extension of the liability provisions to "any person who" fails to comply with FCRA's requirements would bring within the scope of the provisions "persons who furnish information to consumer reporting agencies, such as banks and retailers." H.R. Rep. No. 486, 103d Cong., 2d. Sess. 49 (1994); see also S. Rep. No. 185, 104th Cong., 1st. Sess. 48-49 (1995).

It would be unusual, in and of itself, to construe amendments to an existing scheme as allowing new damages actions against the United States when neither the text nor history of the amendments demonstrates that Congress intended to do so. See *Employees of the Dep't of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 283-285 (1973) (holding that amendments making States subject to the Fair Labor Standards Act did not create monetary liability even though States fell within pre-existing definition of "employer"); cf. *Public Utils. Comm'n*, 345 U.S. at 312-313 (declining to apply statutory definition of "person" when legislative history showed Congress did not intend to incorporate it). Additional factors demonstrate that the 1996 FCRA amendments, in particular, cannot be so construed.

The amendments, like the 1970 Act, demonstrate that Congress did not intend the definition of "person" to be the same across every provision. In addition to amending the civil-remedies provisions to apply to "person[s]," the amendments also added provisions authorizing FCRA enforcement suits to be brought by the Federal Trade Commission (FTC) and the States

against "person[s]" in certain circumstances. §§ 2417, 2418, 110 Stat. 3009-451 to 3009-452. As with the preexisting criminal provision, Congress, without expressly so providing, cannot be understood to have intended the United States or a federal agency to be a "person" subject to an enforcement action by a State or the FTC.

Moreover, in the context of the civil-remedies provisions, it is especially unlikely that Congress intended a definition that would include the United States. If a "person" for purposes of FCRA's civil-remedies provisions in fact included "any * * * government," including the federal government, it would also necessarily include a State. But Congress enacted FCRA's amended civil-remedies provision only months after this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44, 47, 72 (1996), which held that Congress lacked authority under the Commerce Clause to abrogate state sovereign immunity to damages actions. It would have been extraordinary if Congress had responded to *Seminole Tribe* by attempting to subject States to both compensatory and punitive damages under FCRA, and there is no indication that it sought to do so. Congress's use of the term "person" in the 1996 amendment to the civil-remedies provision of FCRA therefore should not be construed to abrogate preexisting immunity to damages suits of sovereign entities, including the States and the United States.

Additionally, Congress had demonstrated earlier that same year that, when it wanted to allow damages actions against the United States under FCRA, it could and would do so expressly. A previous 1996 FCRA amendment had empowered the Federal Bureau of Investigation to obtain and use consumer information from consumer reporting agencies in limited circumstances

for national security purposes. See Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, § 601(a), 109 Stat. 974 (codified, as amended, at 15 U.S.C. 1681u). As part of that amendment, Congress had provided that "[a]ny agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer" for statutory, actual, and, under certain circumstances, punitive damages. 109 Stat. 976-977 (15 U.S.C. 1681u(i)). Having so recently employed such explicit language when it intended to expose the federal government to damages, Congress can be expected to have done the same if it had intended to expose the federal government to damages liability in its amendments to the general civil-remedies provisions later in the same year.

Finally, Congress is unlikely to have intended the 1996 FCRA amendments to disrupt the carefully calibrated remedies available against the federal government under the Privacy Act of 1974. The Privacy Act comprehensively regulates the accuracy and disclosure of official government records, including the disclosure of record information to consumer reporting agencies. See 5 U.S.C. 552a(a)(1)-(5) and (b); *Doe* v. *Chao*, 540 U.S. 614, 618 (2004). The Privacy Act expressly permits recovery of "actual damages" from the United States for violations of certain disclosure-related provisions, when such violations are "intentional or willful." See 5 U.S.C. 552a(g)(1)(C), (D) and (4). The extent of liability under the Privacy Act was the subject of extensive congressional debate: Congress considered and rejected amendments that would have allowed recovery for negligent violations, or for punitive damages. See *Fitzpatrick* v. *IRS*, 665 F.2d 327, 330 (11th Cir. 1982), abrogated in

part on other grounds by *Doe*, 540 U.S. 614. Multiple members of Congress expressed concern about the dramatic effect that such amendments would have on the federal fisc. See, *e.g.*, 120 Cong. Rec. 36,659-36,660 (1974) (Reps. McCloskey, Erlenborn, and Butler); *id.* at 36,956 (Rep. Butler). It is unlikely that Congress, without even mentioning the matter, would have undermined the compromise it reached in the Privacy Act context by authorizing FCRA damages suits against the United States.

B. The Court Of Appeals' Ruling Conflicts With Decisions Of This Court And Presents A Question Of Exceptional Importance That Warrants Review

This Court should grant certiorari to address the Federal Circuit's erroneous conclusion that the Tucker Act and Little Tucker Act waive the United States' sovereign immunity to FCRA claims. As explained above, the court of appeals' reasoning—that the Tucker Acts can provide a waiver of sovereign immunity even for claims under a statute of general applicability that has its own comprehensive remedial scheme—cannot be squared with this Court's longstanding Tucker Act jurisprudence. The Federal Circuit's fundamental methodological error has serious consequences. It provides a basis for plaintiffs to argue that any number of statutes of general applicability both regulate the conduct of the federal government and allow damages suits against the United States for any violations. By accepting such an argument, the Federal Circuit expands its own jurisdiction, the Court of Federal Claims' and district courts' jurisdiction under the Tucker Acts, and the scope of federal liability in ways that Congress neither intended nor contemplated.

This case illustrates the point. The court of appeals' decision invites FCRA suits against the United States, including large putative class-action suits like this one, nationwide, and thereby exposes the public fisc to potentially massive liability. Indeed, even independent of the broader implications of the Federal Circuit's errors, its FCRA conclusion alone would warrant certiorari.

1. The practical impact of the Federal Circuit's FCRA holding is potentially very significant. FCRA regulates a wide range of conduct by "person[s]" who use or disclose information obtained from credit reporting agencies—in particular, "consumer reports," broadly defined to include "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living," when collected for the purpose of evaluating a consumer's fitness for credit, suitability for employment, or other enumerated purposes. 15 U.S.C. 1681a(d)(1). FCRA broadly provides that a "person shall not use or obtain a consumer report for any purpose" except as provided by FCRA. 15 U.S.C. 1681b(f). A "person" also "may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer," except in certain enumerated circumstances. 15 U.S.C. 1681b(b)(2)(A); see 15 U.S.C. 1681a(c) (defining "consumer" as "an individual"); see also 15 U.S.C. 1681d(a) ("A person may not procure or cause to be prepared an investigative consumer report on any consumer" except in specifically enumerated circumstances.). FCRA similarly places conditions on the use of consumer reports by "person[s]" to take "adverse action" against (among others) loan recipients, loan ap-

plicants, employees, and potential employees. 15 U.S.C. 1681b(b)(3), 1681m(a); see 15 U.S.C. 1681a(k)(1)(A) (defining "adverse action," by reference to 15 U.S.C. 1691(d)(6), to include denials or changes in terms of loans); 15 U.S.C. 1681a(k)(1)(B)(ii) (defining "adverse action" to include "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee").

In addition to regulating the use of consumer reports by "person[s]," FCRA also broadly regulates the disclosure of consumer information. For example, "person[s]" who disclose information to consumer reporting agencies must conduct a timely investigation, and correct their disclosures, when the consumer disputes the information's accuracy. 15 U.S.C. 1681s-2(b). Another example is the provision at issue in this case, which requires any "person that accepts credit cards" to "print" no "more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. 1681c(g)(1).

2. The federal government pervasively engages in the kinds of transactions covered by FCRA, and both uses and disseminates large quantities of the type of consumer credit information FCRA regulates. The federal government had a total of $625.8 billion in receivables for Fiscal Year 2010, 88% of which was attributable to loans. Department of the Treasury, Financial Mgmt. Serv., *Fiscal Year 2010 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies* 4 (Mar. 2011), http://www.fms.treas.gov/news/reports/debt10.pdf (*2010 Receivables Report*). It is also the Nation's largest employer, with over two million civilian employees, exclud-

ing the Postal Service. U.S. Dep't of Labor, Bureau of Labor Statistics, *Career Guide to Industries, 2010-11 Edition* (July 2011), http://www.bls.gov/oco/cg/cgs041.htm.

In recognition of federal-government activities, FCRA explicitly provides a damages remedy for the misuse and unlawful disclosure of certain national security information obtained by the Federal Bureau of Investigation from consumer reporting agencies. 15 U.S.C. 1681u(i). And, as discussed, the Privacy Act already comprehensively addresses the disclosure of personal information by federal agencies. 5 U.S.C. 552a. The court of appeals' ruling that the federal government is liable for statutory and compensatory damages under the Tucker Act for the many additional obligations FCRA imposes on "person[s]" threatens to expose the United States to massive additional liability without the clear authorization by Congress that is required for a waiver of sovereign immunity and without explicit limit.

The claim at issue here is illustrative. Respondent's suit arises from a single credit-card transaction in which he paid a $350 federal-court filing fee using pay.gov, a federal-government website for processing online payments. App., *infra*, 85a-86a. Respondent alleges that he received an electronic transaction receipt that contained the expiration date of his credit card, in violation of Section 1681c(g)(1). *Id.* at 86a-87a. On the basis of this transaction, he seeks statutory damages on behalf of all individuals who received such receipts on or after June 4, 2008, *id.* at 92a, a claim that potentially encompasses millions of similar transactions. This Office is informed by the Department of the Treasury that 54 Executive departments, independent agencies, government corporations, and judicial- and legislative-branch entities to-

gether generate over 600 separate credit-card-transaction cash flows on pay.gov. The Department of Treasury is additionally aware of more than 400 credit-card transaction cash flows into the United States Treasury using systems other than pay.gov, an unknown number of which might be subject to similar claims.

And credit-card transactions are only part of the problem. The most serious impact of the Federal Circuit's decision probably would be on the debt-collection activities of federal program agencies. See, *e.g.*, *Talley* v. *United States Dep't of Agric.*, 595 F.3d 754, vacated on reh'g en banc, No. 09-2123, 2010 WL 5887796 (7th Cir. Oct. 1, 2010) (suit against the federal government alleging inaccurate reporting of debt-collection information by the Department of Agriculture to a credit reporting agency). Agencies engaging in direct lending to the public report payment delinquencies—of which there are many—to credit reporting agencies. See *2010 Receivables Report* 4 (reporting over $100 billion in delinquencies in government receivables); see also *id.* at 5 (noting that, because federal loans are often high risk, there are high delinquency rates). The same is true of agencies that do not engage in direct lending, but guarantee consumer loans and are forced to assume those loans and attempt to collect them if they go bad. See *id.* at 4 (reporting that defaulted guaranteed loans accounted for $55.6 billion in federal receivables and $40.6 billion in delinquencies). Indeed, every federal agency is potentially subject to the possibility of needing to inform credit reporting agencies about delinquent debt because every federal agency has employees and contractors who could end up owing money to the agency due to an overpayment or improper payment. See *ibid.* (reporting $79.8 billion in "[a]dministrative [d]ebt" re-

ceivables, including "[f]ines, penalties, and overpayments").

3. By subjecting the full range of government operations to FCRA's diverse liability provisions, the Federal Circuit's decision is likely to take a toll on the fisc never contemplated by Congress. The effect of the decision is not confined to any geographic locale, but instead extends nationwide. As this case demonstrates, a plaintiff with a claim of less than $10,000, or one representing a putative class with individual claims of less than $10,000, can now simply file a FCRA claim in any district court, asserting the Little Tucker Act as the jurisdictional basis for the suit. A plaintiff with a larger claim can file in the Court of Federal Claims, which has nationwide jurisdiction, under the Tucker Act. In either circumstance, the Federal Circuit will assert that it, rather than any regional circuit, has jurisdiction over the case, and its decision in this case will therefore provide the governing law. See 28 U.S.C. 1295(a)(2)-(3); App., *infra*, 18a-22a.

Under these conditions, a circuit conflict is unlikely to develop. Nor is it realistic to expect that the Federal Circuit, which denied rehearing in this case, App., *infra*, 31a-32a, will revisit the question presented. This Court should grant certiorari now to correct the Federal Circuit's error and prevent the federal government from having to litigate, settle, and pay out claims as to which Congress never waived the United States' sovereign immunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2009-1546

JAMES X. BORMES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE

Decided: Nov. 16, 2010

OPINION

Before: RADER, Chief Judge, and NEWMAN and MOORE, *Circuit Judges.*

RADER, *Chief Judge.*

James Bormes appeals the dismissal of his class action lawsuit under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681n(a). *See Bormes v. United States*, 638 F. Supp. 2d 958 (N.D. Ill. 2009). Because FCRA is a money-mandating statute that supports jurisdiction under 28 U.S.C. § 1346(a)(2), this court vacates the dismissal and remands for further proceedings.

I

On August 9, 2008, Bormes, an attorney, filed a lawsuit on behalf of one of his clients in the U.S. District Court for the Northern District of Illinois using its online document filing system. Bormes paid the filing fee using his credit card, and the transaction was processed through the government's pay.gov system. The government then provided Bormes with a confirmation webpage that appeared on Bormes' computer screen. The confirmation page contained the expiration date of Bormes' credit card.

Alleging that the display of his and similarly situated plaintiffs' credit card information violated section 1681c(g)(1) of FCRA, Bormes filed a class action lawsuit against the government. Bormes seeks, among other things, statutory damages, attorney's fees, and costs. In his complaint, Bormes alleged jurisdiction under both 28 U.S.C. § 1346(a)(2), commonly referred to as the Little Tucker Act, and FCRA's own jurisdictional provision, 15 U.S.C. § 1681p.

The government filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. The district court concluded that it had jurisdiction under FCRA, but granted the government's motion to dismiss under Rule 12(b)(6) on the ground that FCRA did not waive the federal government's sovereign immunity for this suit. Because the district court exercised jurisdiction under the jurisdictional provision in FCRA itself, it held that Bormes' arguments for jurisdiction under the Little Tucker Act were moot.

On appeal, the government filed a motion to transfer this case to the Court of Appeals for the Seventh Circuit. A motions panel of this court denied the motion on the ground that Bormes' complaint invoked the district court's jurisdiction under the Little Tucker Act. *Bormes v. United States*, No. 2009-1546, 2010 WL 331771, at *2 (Fed. Cir. Jan. 27, 2010). The panel did not, however, make any decision as to whether FCRA is a "money-mandating statute" sufficient to create jurisdiction under the Little Tucker Act.

After Bormes filed his appeal in this case, a panel of the Court of Appeals for the Seventh Circuit determined that the Tucker Act waives sovereign immunity for FCRA claims. *See Talley v. U.S. Dep't of Agric.*, 595 F.3d 754, 759 (7th Cir. 2010) (Easterbrook, C.J.). The appellate court in *Talley* also held that it did not need to transfer the case to this court because the plaintiff only sought to use the Tucker Act for a waiver of sovereign immunity, not as a basis for jurisdiction. "The Tucker Act *might* have been used for jurisdiction; it is *both* a grant of jurisdiction and a waiver of sovereign immunity. But if the plaintiff elects to use the latter without the former, then jurisdiction does not arise under the Tucker Act. This court therefore has appellate jurisdiction." *Id.* at 763.

The Seventh Circuit later granted the government's motion for rehearing *en banc* and vacated the panel opinion. In the order granting rehearing *en banc*, the court asked the parties to brief "whether the Tucker Act is the exclusive source of subject-matter jurisdiction for remedies that depend on its waiver of sovereign immunity and, if it is, whether this appeal should be transferred to the Federal Circuit under 28 U.S.C. § 1631."

Talley v. U.S. Dep't of Agric., 595 F.3d 754 (7th Cir. 2010) (reh'g en banc granted, opinion vacated, June 10, 2010). As of the date of this opinion, the *Talley* case remains pending.

II

The objective of FCRA is to "promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). The 1970 Act originally regulated "consumer reporting agenc[ies]," or "any person" who assembles or evaluates personal information about consumers that is used to determine eligibility for credit and insurance, among other purposes. 15 U.S.C. § 1681a(d),(f) (2006). FCRA also originally imposed duties on "persons," for example, prohibiting a person from furnishing any information about consumers "to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s-2(a)(1)(A) (2006). The Act defined the term "person" in FCRA to mean "*any* individual, partnership, corporation, trust, estate cooperative association, *government or governmental subdivision or agency*, or other entity." 15 U.S.C. § 1681a(b) (2006) (emphases added). As originally enacted, however, the damages provisions for willful or negligent noncompliance with FCRA only covered "consumer reporting agenc[ies]" or "user[s] of information." Sections 616 and 617 of Pub. L. 91-508, 84 Stat. 1114, 1134 (1970).

In 1996, an amendment to FCRA made, among other things, the damages provisions applicable to "[a]ny person." Consumer Credit Reporting Reform Act of 1996, Section 2412 of Pub. L. 104-208, 110 Stat. 3009-446. Specifically, FCRA now provides as follows:

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681n (emphasis added).

In 2003, another amendment to FCRA added § 1681c(g)(1), the liability provision at issue in this case. Fair and Accurate Credit Transactions Act of 2003, Section 113 of Pub. L. 108-159, 117 Stat. 1959. That provision states:

Except as otherwise provided in this subsection, *no person* that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration

> date upon any receipt provided to the cardholder at the point of the sale or transaction.

Id. (emphasis added).

III

The Little Tucker Act, 28 U.S.C. § 1346, gives the district courts jurisdiction, concurrent with the Court of Federal Claims, over "any other [than tax refund] civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any Act of Congress." The Little Tucker Act is therefore a jurisdictional provision that also operates "to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)." *United States v. Navajo Nation*, 129 S. Ct. 1547, 1551 (2009).

The three commonly-named sections of the Tucker Act are similar. The Indian Tucker Act, 28 U.S.C. § 1505, the Big Tucker Act, 28 U.S.C. § 1491, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), each grant the Court of Federal Claims jurisdiction over specific causes of action against the United States. The Indian Tucker Act grants the Court of Federal Claims exclusive jurisdiction over all Indian claims against the United States. 28 U.S.C. § 1505. The Big Tucker Act grants exclusive jurisdiction to the Court of Federal Claims to money claims against the United States exceeding $10,000. *Jarrett v. White*, 57 Fed. App'x. 87, 88 n.1 (3d Cir. 2003). The Little Tucker Act grants concurrent jurisdiction to district courts and the Court of Federal Claims, to money claims against the United States not exceeding $10,000. *Id.* at 88. This court examines cases under the Indian and Big Tucker Acts to help resolve this appeal.

Because the Little Tucker Act operates to waive sovereign immunity, the district court erred in dismissing Bormes' case without considering whether the Little Tucker Act provided an alternative basis for jurisdiction. If the Little Tucker Act authorizes the district court to hear this case, it also provides the waiver of sovereign immunity that the trial court found lacking in the FCRA itself. *See United States v. Mitchell*, 463 U.S. 206, 216 (1983) ("If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit.").

To support jurisdiction under the Little Tucker Act, the substantive law that provides the basis for the plaintiff's claims must be "money-mandating." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005). A source of law is money-mandating if it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (quotation omitted). This "fair interpretation" rule demands a showing "demonstrably lower" than the initial waiver of sovereign immunity: "It is enough . . . that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' . . . a fair inference will do." *Id.* In most money-mandating inquiries, the statute at issue clearly imposes duties of some kind on the federal government; the main questions become the extent of those duties and the availability of a money remedy in the event of a breach of those duties.

In *White Mountain*, for example, the act at issue expressly stated that the "'former Fort Apache Military

Reservation' would be 'held by the United States in trust for the White Mountain Apache Tribe.'" 537 U.S. at 469 (quoting Pub. L. 86-392, 74 Stat. 8). The Court was asked whether that trust relationship could be fairly interpreted to subject the government to liability in money damages for failing to preserve the trust property. *Id.* at 475. The Court determined that such an interpretation was fair, relying on "elementary trust law." *Id.*

In *Army and Air Force Exchange Service (AAFES) v. Sheehan*, the Court held AAFES regulations governing separation procedures for certain military post exchange employees did not constitute an express or implied-in-fact contract and thus did not authorize the award of money damages in the event of a Government breach. 456 U.S. 728, 738 (1982). The Court held that "jurisdiction over respondent's complaint cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages." *Id.* at 739. Although the Court in *Sheehan* looked for a "specific[] authoriz[ation]" of money damages, 456 U.S. at 739, the Court clarified in *White Mountain* that "an explicit provision for money damages" is not needed in every case. 537 U.S. at 477. Rather, "a fair inference will require an express provision, when the legal current is otherwise against the existence of a cognizable claim." *Id.*

This court often addresses another type of money-mandating question: whether the plaintiff is within the class of plaintiffs entitled to recover under a statute that provides for money damages. Thus, in *Greenlee County, Arizona v. United States*, 487 F.3d 871 (Fed. Cir. 2007), this court confirmed the jurisdiction of the Court of Fed-

eral Claims because the statute at issue provided that "'the Secretary of the Interior *shall make a payment* for each fiscal year to each unit of general local government in which entitlement land is located as set forth in this chapter,'" *id.* at 877 (quoting 31 U.S.C. § 6902(a)(1) (emphasis added)), and the plaintiff had clearly been designated a "unit of general local government." *Id.* Moreover, the court held that the statute clearly mandated money damages because, as "we have repeatedly recognized[,] . . . the use of the word 'shall' generally makes a statute money-mandating." *Id.*

This case poses more difficult questions. Section 1618n [sic] unquestionably provides for money damages. Moreover, the record shows that, at least for jurisdiction, Bormes fits within the class of plaintiffs entitled to recover under the statute. *See Greenlee County*, 487 F.3d at 877 ("[W]here plaintiffs have invoked a money-mandating statute and have made a non-frivolous assertion that they are entitled to relief under the statute, we have held that the Court of Federal Claims has subject-matter jurisdiction over the case.") (quotations omitted)). As discussed below, the government does dispute the adequacy of Bormes's statement of a claim under section 1681c(g)(1). That dispute, however, is not jurisdictional. Instead, this case asks whether the federal government is subject to the damages remedy.

This court refers to the cases above to gain insight into the kind of language that makes a statute money-mandating under the "fair interpretation" standard. Likewise, the government invokes *LeBlanc v. United States*, 50 F.3d 1025 (Fed. Cir. 1995), to support its position. In *LeBlanc*, the plaintiff was a former employee of the government's Defense Contract Administration Ser-

vice. Mr. LeBlanc alleged that he was fired in retaliation for his earlier suit against a government contractor under the False Claims Act. Mr. LeBlanc sued the government for wrongful termination, seeking, among other things, reinstatement and back pay. Mr. LeBlanc contended that the following language from the False Claims Act was money-mandating: "*Any employee* who is discharged . . . by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section . . . shall be entitled to all relief necessary to make the employee whole." *Id.* at 1029 (quoting 31 U.S.C. § 3730(h)) (emphasis added). The court noted, however, that another statute, the Civil Service Reform Act of 1978 (CSRA), "essentially preempted the field" of providing procedural protections for civil service employees faced with adverse personnel actions. *Id.* at 1029. Absent a "clear statement in section 3730(h) of a congressional intent to create a remedy for *federal* employees in addition to those provided in the CSRA," this court declined to interpret the Act to mandate monetary compensation by the federal government for any damages. *Id.* at 1030.

Section 1618n resembles the provisions at issue in *White Mountain* and *Greenlee County* more than those in *Sheehan* or *LeBlanc*. Unlike *LeBlanc*, for example, where the Act gave no indication that the term "any employee" would include federal employees, in this case the Act expressly defines the term "person" to include "any . . . government." § 1681a(b). Similarly, and unlike *Sheehan*, this case does not lack a "specific authorization." Rather, government counsel agreed at oral argument that the reference to "any . . . government" in § 1681a(b)'s definition of "person" refers to the federal

government. Oral Argument at 14:18-15:30 & 18:40-19:07, *available at* http://www.cafc.uscourts.gov/. Indeed, the same attorney, in oral argument before the U.S. Court of Appeals for the Seventh Circuit in the *Talley* case, noted that the definition of "person" in section 1681a(b) "subject[s] the United States to [FCRA's] substantive provisions." Oral Argument at 10:50, *Talley v. U.S. Dep't of Agric.*, 595 F.3d 754 (No. 09-2123), *available at* http://www.ca7.uscourts.gov/. Once this court reads "person" as including the federal government in some provisions, a fair interpretation, based on "elementary" rules of statutory interpretation, *White Mountain*, 537 U.S. at 475, applies the same definition throughout. *See Burgess v. United States*, 553 U.S. 124, 129 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case.") (alterations in original; internal quotation marks omitted)). Moreover, as in *Greenlee County*, the Act used the mandatory "shall" in its damages provision—another indication that the law envisions monetary redress for violations. As Chief Judge Easterbrook succinctly stated in the vacated *Talley* opinion, "Congress need not add 'we really mean it!' to make statutes effectual." 595 F.3d at 758.

The government argues that the FCRA cannot be money-mandating because it contains a distinctive grant of jurisdiction to federal district courts. Specifically, section 1681p states, in relevant part, "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction." The government relies on this court's opinion in *Blueport Co. v. United States*, which, in the context of holding that the Digital Millennium Copyright Act (DMCA) is not

money-mandating, stated that "the CFC lacks jurisdiction to adjudicate claims created by statutes, like the DMCA, which specifically authorize jurisdiction in the district courts." 533 F.3d 1374, 1384 (2008).

Blueport does not control in this case. Because the Big Tucker Act and Little Tucker Act follow the same rules, this court may ask if *Blueport* would prevent the Court of Federal Claims from exercising jurisdiction if Bormes had initiated his case in that court. If *Blueport* would block jurisdiction in the Court of Federal Claims under the Big Tucker Act, then it would also prevent a district court from exercising jurisdiction (and finding the concomitant waiver of sovereign immunity) in the Little Tucker Act. This court need not, however, reach that conclusion.

Blueport does not apply because the jurisdictional grant in FCRA is not "like the DMCA." *Id.* Instead, the former grants jurisdiction to "any appropriate United States district court, without regard to the amount in controversy, or *in any other court of competent jurisdiction.*" 15 U.S.C. § 1681p (emphasis added).

The government asserts that "any other court of competent jurisdiction" refers to state court jurisdiction rather than other federal tribunals. The government explains that the Supreme Court interpreted the phrase "any other court of competent jurisdiction" as "provid[ing] for concurrent federal-court and state-court jurisdiction over civil liability suits." *Bank One Chicago N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 268, 275 (1996). The government also argues because the FCRA grants jurisdiction to federal courts without regard to the amount in controversy, it could not have intended to grant jurisdiction to the Court of Federal

Claims, because the Tucker Act grants jurisdiction to the Court of Federal Claims only for claims over $10,000.

Moreover, FCRA initially contained an amount-in-controversy requirement for federal-question suits as well as diversity suits. That amount-in-controversy requirement thus explains the jurisdictional grant in the FCRA to district courts "without regard to the amount in controversy," for without that language, FCRA claims below the amount-in-controversy requirement would have been relegated to state courts.

In 1980, however, the jurisdictional minimum for federal-question cases was rescinded. Section 2(a) of Pub. L. 96-486, 94 Stat. 2369 (1980). If the "amount in controversy" language is to retain meaning, the government argues, it should now refer to the amount-in-controversy requirement that distinguishes Big Tucker Act from Little Tucker Act cases and should indicate that Congress meant to take suits for over $10,000 out of the CFC's jurisdiction, and thus out of the scope of the Tucker Act.

We conclude that the Court of Federal Claims is a court of competent jurisdiction for purposes of this statute. As the motions panel in this case noted, "[t]he Court [in *Bank One*] did not state . . . that federal courts other than the district courts would not also have concurrent jurisdiction over such cases." 2010 WL 331771, at *2. Moreover, this court will not hold that the Act impliedly repealed the jurisdictional grant of the Tucker Act for enforcement of FCRA rights simply because the FCRA does not contain an amount-in-controversy requirement. *See Preseault v. ICC*, 494 U.S. 1, 12 (1990) ("Congress did not exhibit the type of

'unambiguous intention to withdraw the Tucker Act remedy that is necessary to preclude a Tucker Act claim.") (internal quotations and citations omitted)).

As discussed, a fair interpretation of FCRA mandates money damages from the federal government for damages. This conclusion withstands an attack based on arguments about an "express" waiver of sovereign immunity in FCRA. As discussed earlier, the test for a money-mandating statute is less stringent than the test for a waiver of sovereign immunity in the same statute.

In this connection, this court notes that the 1996 and 2003 amendments subjected "persons" who print receipts to liability. Of course, under FCRA's unique definition of "person," a sovereign, namely the United States, would also face potential liability. *See USPS v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 745-46 (2004). Thus, a question arises about the sufficiency of this waiver and the particular clarity needed to infer a waiver of sovereign immunity when considering statutory amendments that change the ordinary meaning of preexisting provisions. *See Emp's of the Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare*, 411 U.S. 279 (1973). Whatever strength this argument has in considering the sufficiency of FCRA's waiver of sovereign immunity, it is not compelling in the context of determining FCRA's mandate of money damages.

This court is also aware that FCRA provides for punitive and criminal punishment, which cannot be imposed upon the government under the Tucker Act. *See Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997) (holding that Tucker Act is "limited to cases in which the Constitution or a federal statute requires the payment of money damages *as compensation for their*

violation") (emphasis added)). This limitation on Tucker Act remedies does not mean that FCRA is not money-mandating. Rather this limitation means that FCRA's money-mandating provisions do not extend beyond certain types of claims, such as those at issue in this case. *See Talley*, 595 F.3d at 761("As we see things . . . [the government's argument] means only that punitive damages are unavailable against the United States unless the Tucker Act authorizes them.").

Similarly, FCRA permits recovery for negligence, but the Tucker Act does not permit negligence claims. *See Rick's Mushroom Serv. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008). As the vacated opinion in *Talley* also noted, however, a negligence claim is different than a statutory claim that includes an element which is analyzed under a negligence standard. 595 F.3d at 761.

In addition, a separate FCRA provision expressly provides for remedies against the United States. Specifically, section 1681u requires consumer reporting agencies to furnish consumer credit information to the Federal Bureau of Investigation, but limits the FBI's response tools. In imposing liability on "[a]ny agency or department of the United States," FCRA limits statutory damages to $100 and provides actual and punitive damages. 15 U.S.C. § 1681u(i). With respect to this language, the government argues that Congress knew how to subject the United States to damages when it wanted to do so. To the contrary, however, this provision shows only that Congress presumably needed to create a different remedial scheme in section 1681u because that section specifically limits what the government can do with credit information. This different scheme does not

mean that the Act did not speak broadly enough to include the United States when it prohibited certain "persons" from use of credit information.

Finally, the government argues that different statutes of limitations govern Tucker Act claims and FCRA claims. Under section 1681p, a FCRA action must be commenced either two years after the plaintiff discovers the violation, or within five years after the date on which the alleged FCRA violation occurs. In contrast, a default six year statute of limitations applies to Tucker Act claims. 28 U.S.C. § 2401(a). The vacated *Talley* opinion convincingly dealt with this argument as well, noting that "different statutes of limitations are common in federal practice, and the rule is that the more specific limit prevails, not that a short limit cancels out any substantive statute." 595 F.3d at 760 (citing *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008)). This court adopts the same reasoning in support of the statutory language and context that makes the FCRA money-mandating.

IV

The parties have also briefed whether Bormes' claim should be dismissed for failure to state a claim upon which relief can be granted. Specifically, the government contends that the alleged wrongful action in this case—providing credit card information that is displayed on a consumer's computer screen—does not qualify as a willful violation of 15 U.S.C. § 1681c(g)(1), which requires "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."

Whether a case must be dismissed under Rule 12(b)(6) is a question of law that this court may answer in the first instance. *See* Fed. R. Civ. P. 12(b)(6) advisory committee's note; *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995) (determining whether a complaint was properly dismissed under Rule 12(b)(6) is a question of law that the court reviews independently); *see also Thompson v. Microsoft Corp.*, 471 F.3d 1288, 1291 (Fed. Cir. 2006) (addressing a question of law regarding jurisdiction in the first instance). Nonetheless, the government, both in its brief and at oral argument, asked this court for the opportunity to fully develop its Rule 12(b)(6) arguments before the district court. This court decides to give weight to the moving party's preference in this case, and will allow the district court to consider first the government's motion to dismiss on that additional ground, as well as any others that have not been waived. Thus, this court vacates the judgment and remands for further proceedings.

VACATED AND REMANDED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2009-1546

JAMES X. BORMES, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Filed: Jan. 27, 2010

ON MOTION

ORDER

Before: NEWMAN, FRIEDMAN and LOURIE, *Circuit Judges.*

FRIEDMAN, *Circuit Judge.*

The United States has moved to transfer this case to the United States Court of Appeals for the Seventh Cir-

cuit, on the ground that it, and not this court, has jurisdiction over this appeal. We conclude, however, that this court has jurisdiction, and therefore deny the transfer motion.

I

The appellant James X. Bormes, "individually and on behalf of all others similarly situated," filed this suit in the United States District Court for the Northern District of Illinois seeking statutory damages from the United States for its alleged violation of the Fair Credit Reporting Act ("Reporting Act"), 15 U.S.C. § 1681 *et seq.* He contends that the United States violated that Act by including credit card expiration dates on confirmation pages for payment of court filing fees through the government's www.pay.gov system. On the government's motion, the district court dismissed the complaint because, in the Reporting Act, the United States did not waive its sovereign immunity from such a suit.

Bormes appealed the dismissal to this court. The government moved to transfer the case to the Court of Appeals for the Seventh Circuit.

II

Under 28 U.S.C. § 1295(a)(2), this court has exclusive jurisdiction "of an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title." Section 1346 tracks the Tucker Act, which defines the jurisdiction of the Court of Federal Claims. 28 U.S.C. § 1491(a)(1). Known as the Little Tucker Act, § 1346 gives the district courts jurisdiction, concurrent with the Court of Federal Claims, of "any other [than tax refund] civil action or claim against the

United States, not exceeding $10,000 in amount, founded . . . upon any Act of Congress." Bormes' complaint invoked the district court's jurisdiction under the Little Tucker Act.

The Reporting Act states that "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount [not exceeding actual damages of $1,000 plus punitive damages and attorney's fees]." 15 U.S.C. § 1681n(a). The jurisdictional provision of that Act governing suits for violation provides in part:

> An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction.

15 U.S.C. § 1681p.

On their face, these provisions appear to give this court jurisdiction over this appeal. The jurisdiction of the district court was founded upon an Act of Congress. The Reporting Act authorizes suits "in any appropriate" district court ("without regard to the amount in controversy") "or in any other court of competent jurisdiction" "to enforce any liability created under this subchapter." The complaint alleges a monetary claim against the United States for the government's alleged violation of that Act.

The government points to the statement in *Blueport Co. v. United States*, 533 F.3d 1374 (Fed. Cir. 2008), that the Court of Federal Claims "lacks jurisdiction to adjudicate claims created by statutes . . . which specifically

authorize jurisdiction in the district courts." 533 F.3d at 1384. It contends that the Reporting Act is such a statute; that under *Blueport* the Court of Federal Claims would not have had jurisdiction over this case; that because of the parallellism of the Main and Little Tucker Acts, the district court's jurisdiction over this case did not rest on the Little Tucker Act; and that this court therefore does not have jurisdiction over the appeal from the district court's judgment.

The conclusion, however, does not follow from the premises. If this suit had been brought in the Court of Federal Claims, any appeal in that case, including a challenge to that court's dismissal of the case on the same ground the district court gave, would have been to this court, not to the Seventh Circuit. 28 U.S.C. § 1295(a)(3); *Blueport*, 533 F.3d at 1378. It would seem anomalous if we would have jurisdiction over an appeal from the dismissal of such suit brought in the Court of Federal Claims, but the Seventh Circuit would have jurisdiction over an appeal from the dismissal of an identical suit brought in the district court. Indeed, even if the Court of Federal Claims would not have had jurisdiction over this suit, it does not necessarily follow that this court would lack jurisdiction over the appeal from the district court's dismissal of this suit.

Blueport was an appeal to this court from an order of the Court of Federal Claims dismissing a copyright infringement suit against the United States because the government had not waived its sovereign immunity. The *Blueport* statement upon which the government relies relates to the jurisdiction of the Court of Federal Claims, and there was no question that this court had jurisdiction to review that court's decision. The question

in the present case, however, is whether this court has jurisdiction to review the district court's decision—an issue *Blueport* did not address.

Moreover, even under the *Blueport* standard quoted above, it is unclear whether the Court of Federal Claims would have had jurisdiction over this suit. The Reporting Act gives jurisdiction over suits thereunder not only to "any appropriate district court" but also to "any other court of competent jurisdiction." Would the Court of Federal Claims be such a court?

The Supreme Court has viewed similar phraseology in a different statute—"Any action under this section may be brought in any United States district court or in any other court of competent jurisdiction"—as "provid[ing] for concurrent federal-court and state-court jurisdiction over civil liability suits." *Bank One Chicago N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 268, 275, 116 S. Ct. 637, 133 L. Ed. 2d 635 (1996). The Court did not state, however, that federal courts other than the district courts would not also have concurrent jurisdiction over such cases. It may be, however, that because the district courts have jurisdiction under the Reporting Act "without regard to the amount in controversy," there was no occasion to give concurrent jurisdiction to the Court of Federal Claims over cases in which the amount in controversy exceeds the $10,000 limitation in the Little Tucker Act.

The issue is close but on balance we conclude that this court has jurisdiction over this appeal.

The motion to transfer this case to the Court of Appeals for the Seventh Circuit is DENIED. The United States' brief is due within 40 days of the date of filing of this order.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 08-C-7409

JAMES X. BORMES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: July 24, 2009

MEMORANDUM OPINION

CHARLES R. NORGLE, District Judge.

Before the Court is Defendant United States of America's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief May Be Granted. For the following reasons, the Motion is granted.

I. BACKGROUND

In his Class Action Complaint, Plaintiff James X. Bormes ("Bormes") alleges the following facts. In October 2000, Defendant United States of America (the "United States" or the "Government"), through the United States Department of the Treasury's Financial Management Service, launched Pay.gov, an internet-based billing and payment processing system that allows consumers to make online payments to various government agencies by credit or debit card. Numerous Government agencies utilize Pay.gov to process online credit and debit card payments, including: the Department of Agriculture, the Department of Education, the Department of Health and Human Services, the Department of the Treasury, the Library of Congress, the National Park Foundation, the Social Security Administration, and the United States District Courts.

On or about August 9, 2008, Bormes, an attorney, filed a lawsuit on behalf of one of his clients in the Northern District of Illinois using its online CM/ECF document filing system. Bormes paid the filing fee using his American Express credit card, and the transaction was processed through the Government's Pay.gov system. The Government then provided Bormes with a confirmation webpage displayed on Bormes' computer screen. Bormes printed copies of the confirmation page for his records. The confirmation page and printed copies of it contained the last four digits of Bormes' credit card number, along with the card's expiration date. Bormes alleges that the inclusion of his card's expiration date violates the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq., as amended by the Fair and

Accurate Credit Transaction Act. That statute provides, in pertinent part:

> Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

15 U.S.C. § 1681c(g)(1).

Bormes purports to bring this action on behalf of himself and a class of individual cardholders who were provided electronically printed receipts from the Government on or after June 4, 2008, where the receipt displayed more than the last five digits of the cardholder's credit or debit card number and/or the expiration date of the card. He seeks, *inter alia*, statutory damages, attorneys' fees, and costs.

The United States filed its Motion to Dismiss on May 1, 2009. The Motion is fully briefed and before the Court.

II. DISCUSSION

A. Standard of Decision

The Court first notes that the Government styles its Motion to Dismiss as one brought in part for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), based on the sovereign immunity of the United States. Older case law supports the Government's position that sovereign immunity is a jurisdictional issue. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("It is elementary that '[the] United States, as sovereign, is immune from suit save as it con-

sents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *Bartley v. United States*, 123 F.3d 466, 467 (7th Cir. 1997).

The Seventh Circuit, however, has recently interpreted newer Supreme Court precedent to indicate that the principle of sovereign immunity cannot divest District Courts of the power to adjudicate a case. "[W]hat sovereign immunity means is that relief against the United States depends on a statute; the question is not the competence of the court to render a binding judgment, but the propriety of interpreting a given statute to allow particular relief." *Parrott v. United States*, 536 F.3d 629, 634 (7th Cir. 2008) (citing *Irwin v. Dept. of Veteran Affairs*, 498 U.S. 89, 93-96 (1990) and *McNeil v. United States*, 508 U.S. 106, 112 (1993)). Under the more current case law, the Court therefore finds that it has jurisdiction over this suit brought pursuant to federal statute.[1]

The dispositive issue thus becomes whether Bormes is entitled to seek relief under the FCRA on the facts he has alleged. *See Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008) ("The district judge made one mistake, though a harmless one. That was to dismiss the suit under Rule 12(b)(1) of the civil rules. That rule is intended for cases not within the jurisdiction of the district court . . . Jurisdiction is determined by what the plaintiff claims rather than by what may come into the litigation by way of defense.") (internal citation omit-

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[1] Bormes' assertion that the Little Tucker Act provides the Court with jurisdiction over this matter is therefore moot.

ted); *Frey v. EPA*, 270 F.3d 1129, 1132-33 (7th Cir. 2001) (explaining that certain provisions restrict a federal court's power to adjudicate matters, while other provisions merely set limits on a plaintiff's right to recover). Despite its label, the Court therefore construes the Government's Motion as brought entirely under Rule 12(b)(6), for failure to state a claim.

In deciding a Rule 12(b)(6) motion, the Court accepts all well-pleaded facts as true, and draws all reasonable inferences in favor of the plaintiff. *See, e.g., Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 977-78 (7th Cir. 1999). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims . . . Rule 12(b)(6) should be employed only when the complaint does not present a legal claim." *Smith v. Cash Store Mgmt. Inc.*, 195 F.3d 325, 327 (7th Cir. 1999); *Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). The Court recognizes, however, that the "old formula—that the complaint must not be dismissed unless it is beyond doubt without merit—was discarded by the *Bell Atlantic* decision." *Limestone Dev. Corp. v. Vill. of Lamont*, 520 F.3d 797, 803 (7th Cir. 2008) (citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007)). Following *Bell Atlantic*, a complaint will survive a motion to dismiss only when the complaint "contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case." *Limestone Dev. Corp.*, 520 F.3d at 802-03.

B. The Government's Motion to Dismiss

The well-established doctrine of sovereign immunity protects the United States from suit except where Con-

gress has "unequivocally expressed" a waiver of immunity. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); *Automatic Sprinkler Corp. of America v. Darla Environmental Specialists, Inc.*, 53 F.3d 181, 182 (7th Cir. 1995) ("The principle of governmental immunity is simple: anyone who seeks money from the Treasury needs a statute authorizing that relief."). "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell*, 445 U.S. at 538 (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

Keeping these principles in mind, the Court will inquire as to whether the FCRA unequivocally expresses a waiver of sovereign immunity. The Court turns first to the FCRA's express language. The FCRA imposes liability on "any person" who willfully fails to comply with its provisions. 15 U.S.C. § 1681n(a). That statute defines a "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." *Id.* at § 1681a(b).

Bormes asserts that the FCRA's inclusion of the generic term "government" effectively waives the United States' sovereign immunity. The Court disagrees. As the Government correctly points out, other federal statues have unequivocally waived the United States' sovereign immunity by expressly inserting the specific term "United States" into the statutory language. For example, the Federal Torts Claims Act authorizes "claims against the *United States*, for money damages . . . for injury or loss of properly . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or

employment." 28 U.S.C. § 1346(b)(1) (emphasis added); see also 28 U.S.C. § 2409a(a) ("The *United States* may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest. . . . ") (emphasis added). In fact, a separate section of the FCRA expressly provides that the United States may be liable for certain violations. "Any agency or department of the *United States* obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer. . . . " 15 U.S.C. § 1681u(i) (emphasis added). These statutes have clearly and unambiguously waived the sovereign immunity of the United States. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.") (internal citations omitted). Because the section of the FCRA under which Bormes seeks relief, 15 U.S.C. § 1681n, has not so unequivocally waived the sovereign immunity of the United States, Bormes fails to present a claim under which relief can be granted. *See Limestone Dev. Corp.*, 520 F.3d at 802-03. As the Court finds the issue of sovereign immunity dispositive of the Government's Motion to Dismiss, the Court does not reach the Government's alternative assertions in support of its Motion.

III. CONCLUSION

For the foregoing reasons, the United States' Motion to Dismiss is granted. IT IS SO ORDERED.

ENTER:

/s/ CHARLES R. NORGLE
CHARLES RONALD NORGLE, Judge
United States District Court

Dated: July 24, 2009

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Case No. 2009-1546

JAMES X. BORMES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Mar. 15, 2011]

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellee, and a response thereto having been invited by the court and filed by the Appellant, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 22, 2011.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY
Clerk

Dated: 03/15/2011

cc: John G. Jacobs
Henry C. Whitaker

APPENDIX E

1. 15 U.S.C. 1681a provides:

Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) CONSUMER REPORT.—

(1) IN GENERAL.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness,[1] credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

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[1] So in original. Probably should be "creditworthiness."

(2) EXCLUSIONS.—Except as provided in paragraph (3), the term "consumer report" does not include—

(A) subject to section 1681s-3 of this title, any—

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (*o*) or (x) of this section.

(3) RESTRICTION ON SHARING OF MEDICAL INFORMATION.—Except for information or any communication of information disclosed as provided in section 1681b(g)(3) of this title, the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is—

(A) medical information;

(B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or

(C) an aggregate list of identified consumers based on payment transactions for medical products or services.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) MEDICAL INFORMATION.—The term "medical information"—

(1) means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to—

(A) the past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the payment for the provision of health care to an individual.[2]

(2) does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(j) DEFINITIONS RELATING TO CHILD SUPPORT OBLIGATIONS.—

(1) OVERDUE SUPPORT.—The term "overdue support" has the meaning given to such term in section 666(e) of title 42.

(2) STATE OR LOCAL CHILD SUPPORT ENFORCEMENT AGENCY.—The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) ADVERSE ACTION.—

(1) ACTIONS INCLUDED.—The term "adverse action"—

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means—

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse

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[2] So in original. The period probably should be "; and".

or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is—

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) APPLICABLE FINDINGS, DECISIONS, COMMENTARY, AND ORDERS.—For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

(*l*) FIRM OFFER OF CREDIT OR INSURANCE.—The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness[3] or insurability, as applicable, that are established—

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification—

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

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[3] So in original. Probably should be "creditworthiness".

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was—

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) CREDIT OR INSURANCE TRANSACTION THAT IS NOT INITIATED BY THE CONSUMER.—The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of—

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) STATE.—The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(*o*) EXCLUDED COMMUNICATIONS.—A communication is described in this subsection if it is a communication—

(1) that, but for subsection (d)(2)(D) of this section, would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of—

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and

(5) with respect to which—

(A) the consumer who is the subject of the communication—

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication—

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which an action is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) CONSUMER REPORTING AGENCY THAT COMPILES AND MAINTAINS FILES ON CONSUMERS ON A NATIONWIDE BASIS.—The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness[4], credit standing, or credit capacity, each of the following regarding consumers residing nationwide:

(1) Public record information.

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[4] So in original. Probably should be "creditworthiness".

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

(q) DEFINITIONS RELATING TO FRAUD ALERTS.—

(1) ACTIVE DUTY MILITARY CONSUMER.—The term "active duty military consumer" means a consumer in military service who—

(A) is on active duty (as defined in section 101(d)(1) of title 10) or is a reservist performing duty under a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10; and

(B) is assigned to service away from the usual duty station of the consumer.

(2) FRAUD ALERT; ACTIVE DUTY ALERT.—The terms "fraud alert" and "active duty alert" mean a statement in the file of a consumer that—

(A) notifies all prospective users of a consumer report relating to the consumer that the consumer may be a victim of fraud, including identity theft, or is an active duty military consumer, as applicable; and

(B) is presented in a manner that facilitates a clear and conspicuous view of the statement described in subparagraph (A) by any person requesting such consumer report.

(3) IDENTITY THEFT.—The term "identity theft" means a fraud committed using the identifying information of another person, subject to such further definition as the Commission may prescribe, by regulation.

(4) IDENTITY THEFT REPORT.—The term "identity theft report" has the meaning given that term by rule of the Commission, and means, at a minimum, a report—

(A) that alleges an identity theft;

(B) that is a copy of an official, valid report filed by a consumer with an appropriate Federal, State, or local law enforcement agency, including the United States Postal Inspection Service, or such other government agency deemed appropriate by the Commission; and

(C) the filing of which subjects the person filing the report to criminal penalties relating to the filing of false information if, in fact, the information in the report is false.

(5) NEW CREDIT PLAN.—The term "new credit plan" means a new account under an open end credit plan (as defined in section 1602(i) of this title) or a new credit transaction not under an open end credit plan.

(r) CREDIT AND DEBIT RELATED TERMS.—

(1) CARD ISSUER.—The term "card issuer" means—

(A) a credit card issuer, in the case of a credit card; and

(B) a debit card issuer, in the case of a debit card.

(2) CREDIT CARD.—The term "credit card" has the same meaning as in section 1602 of this title.

(3) DEBIT CARD.—The term "debit card" means any card issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account of the consumer at such financial institution, for the purpose of transferring money between accounts or obtaining money, property, labor, or services.

(4) ACCOUNT AND ELECTRONIC FUND TRANSFER.—The terms "account" and "electronic fund transfer" have the same meanings as in section 1693a of this title.

(5) CREDIT AND CREDITOR.—The terms "credit" and "creditor" have the same meanings as in section 1691a of this title.

(s) FEDERAL BANKING AGENCY.—The term "Federal banking agency" has the same meaning as in section 1813 of title 12.

(t) FINANCIAL INSTITUTION.—The term "financial institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 461(b) of title 12) belonging to a consumer.

(u) RESELLER.—The term "reseller" means a consumer reporting agency that—

(1) assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer for purposes of furnishing such information to any third party, to the extent of such activities; and

(2) does not maintain a database of the assembled or merged information from which new consumer reports are produced.

(v) COMMISSION.—The term "Commission" means the Federal Trade Commission.

(w) NATIONWIDE SPECIALTY CONSUMER REPORTING AGENCY.—The term "nationwide specialty consumer reporting agency" means a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to—

(1) medical records or payments;

(2) residential or tenant history;

(3) check writing history;

(4) employment history; or

(5) insurance claims.

(x) EXCLUSION OF CERTAIN COMMUNICATIONS FOR EMPLOYEE INVESTIGATIONS.—

(1) COMMUNICATIONS DESCRIBED IN THIS SUBSECTION.—A communication is described in this subsection if—

(A) but for subsection (d)(2)(D) of this section, the communication would be a consumer report;

(B) the communication is made to an employer in connection with an investigation of—

(i) suspected misconduct relating to employment; or

(ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer;

(C) the communication is not made for the purpose of investigating a consumer's credit worthiness,[5] credit standing, or credit capacity; and

(D) the communication is not provided to any person except—

(i) to the employer or an agent of the employer;

(ii) to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government;

(iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee;

(iv) as otherwise required by law; or

(v) pursuant to section 1681f of this title.

(2) SUBSEQUENT DISCLOSURE.—After taking any adverse action based in whole or in part on a communication described in paragraph (1), the employer shall disclose to the consumer a summary containing

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[5] So in original. Probably should be "creditworthiness,".

the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) of this section an investigative consumer report need not be disclosed.

(3) SELF-REGULATORY ORGANIZATION DEFINED.—For purposes of this subsection, the term "self-regulatory organization" includes any self-regulatory organization (as defined in section 78c(a)(26) of this title), any entity established under title I of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7211 et seq.], any board of trade designated by the Commodity Futures Trading Commission, and any futures association registered with such Commission.

2. 15 U.S.C. 1681b (2006 & Supp. III 2009) provides:

Permissible purposes of consumer reports

(a) In general

Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information—

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(G) executive departments and agencies in connection with the issuance of government-sponsored individually-billed travel charge cards.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that—

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of title 42 for use to set an initial or modified child support award.

(6) To the Federal Deposit Insurance Corporation or the National Credit Union Administration as part of its preparation for its appointment or as part of its exercise of powers, as conservator, receiver, or

liquidating agent for an insured depository institution or insured credit union under the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.] or the Federal Credit Union Act [12 U.S.C. 1751 et seq.], or other applicable Federal or State law, or in connection with the resolution or liquidation of a failed or failing insured depository institution or insured credit union, as applicable.

(b) Conditions for furnishing and using consumer reports for employment purposes

(1) Certification from user

A consumer reporting agency may furnish a consumer report for employment purposes only if—

(A) the person who obtains such report from the agency certifies to the agency that—

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3)[6] of this title.

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[6] See References in Text note below.

(2) Disclosure to consumer

(A) In general

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means

If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application—

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 1681m(a)(3) of this title; and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if—

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions

(A) In general

Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates—

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3)[7] of this title.

(B) Application by mail, telephone, computer, or other similar means

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 1681m(a) of this title, within 3 business days of taking such action, an oral, written or electronic notification—

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the

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[7] See References in Text note below.

specific reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Federal Trade Commission under section 1681g(c)(3)[8] of this title.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if—

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

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[8] See References in Text note below.

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(4) Exception for national security investigations

(A) In general

In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that—

(i) the consumer report is relevant to a national security investigation of such agency or department;

(ii) the investigation is within the jurisdiction of such agency or department;

(iii) there is reason to believe that compliance with paragraph (3) will—

(I) endanger the life or physical safety of any person;

(II) result in flight from prosecution;

(III) result in the destruction of, or tampering with, evidence relevant to the investigation;

(IV) result in the intimidation of a potential witness relevant to the investigation;

(V) result in the compromise of classified information; or

(VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.

(B) Notification of consumer upon conclusion of investigation

Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made—

(i) a copy of such consumer report with any classified information redacted as necessary;

(ii) notice of any adverse action which is based, in part, on the consumer report; and

(iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

(C) Delegation by head of agency or department

For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her author-

ities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the Senior Executive Service or equivalent civilian or military rank.

(D) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Classified information

The term "classified information" means information that is protected from unauthorized disclosure under Executive Order No. 12958 or successor orders.

(ii) National security investigation

The term "national security investigation" means any official inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer

(1) In general

A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of sub-

section (a)(3) of this section in connection with any credit or insurance transaction that is not initiated by the consumer only if—

(A) the consumer authorizes the agency to provide such report to such person; or

(B)(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e) of this section;

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e) of this section, to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph; and

(iv) the consumer report does not contain a date of birth that shows that the consumer has not attained the age of 21, or, if the date of birth on the consumer report shows that the consumer has not attained the age of 21, such consumer consents to the consumer reporting agency to such furnishing.

(2) Limits on information received under paragraph (1)(B)

A person may receive pursuant to paragraph (1)(B) only—

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries

Except as provided in section 1681g(a)(5) of this title, a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) Reserved

(e) Election of consumer to be excluded from lists

(1) In general

A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) of this section in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or

insurance transaction that is not initiated by the consumer.

(2) Manner of notification

A consumer shall notify a consumer reporting agency under paragraph (1)—

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system

Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall—

(A) inform the consumer that the election is effective only for the 5-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at

the time the consumer provides notification through the system.

(4) Effectiveness of election

An election of a consumer under paragraph (1)—

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency—

(i) subject to subparagraph (C), during the 5-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

(5) Notification system

(A) In general

Each consumer reporting agency that, under subsection (c)(1)(B) of this section, furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall—

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after September 30, 1996, and not less than annually thereafter, in a publication of general circulation in the area served by the agency—

(I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to

notify the agency of the consumer's election under clause (i).

(B) Establishment and maintenance as compliance

Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.

(6) Notification system by agencies that operate nationwide

Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) Certain use or obtaining of information prohibited

A person shall not use or obtain a consumer report for any purpose unless—

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and

(2) the purpose is certified in accordance with section 1681e of this title by a prospec-

tive user of the report through a general or specific certification.

(g) Protection of medical information

(1) Limitation on consumer reporting agencies

A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information (other than medical contact information treated in the manner required under section 605(a)(6) of this title) about a consumer, unless—

(A) if furnished in connection with an insurance transaction, the consumer affirmatively consents to the furnishing of the report;

(B) if furnished for employment purposes or in connection with a credit transaction—

(i) the information to be furnished is relevant to process or effect the employment or credit transaction; and

(ii) the consumer provides specific written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished; or

(C) the information to be furnished pertains solely to transactions, accounts, or

balances relating to debts arising from the receipt of medical services, products, or devises, where such information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices, as provided in section 1681c(a)(6) of this title.

(2) Limitation on creditors

Except as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information (other than medical information treated in the manner required under section 1681c(a)(6) of this title) pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit.

(3) Actions authorized by Federal law, insurance activities and regulatory determinations

Section 1681a(d)(3) of this title shall not be construed so as to treat information or any communication of information as a consumer report if the information or communication is disclosed—

(A) in connection with the business of insurance or annuities, including the activities described in section 18B of the model Privacy of Consumer Financial and Health

Information Regulation issued by the National Association of Insurance Commissioners (as in effect on January 1, 2003);

(B) for any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996, or referred to under section 1179 of such Act,[9] or described in section 6802(e) of this title; or

(C) as otherwise determined to be necessary and appropriate, by regulation or order and subject to paragraph (6), by the Commission, any Federal banking agency or the National Credit Union Administration (with respect to any financial institution subject to the jurisdiction of such agency or Administration under paragraph (1), (2), or (3) of section 1681s(b) of this title,[10] or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).

(4) Limitation on redisclosure of medical information

Any person that receives medical information pursuant to paragraph (1) or (3) shall not

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[9] See References in Text note below.

[10] So in original. A closing parenthesis probably should precede the comma.

disclose such information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

(5) Regulations and effective date for paragraph (2)

(A) Regulations required

Each Federal banking agency and the National Credit Union Administration shall, subject to paragraph (6) and after notice and opportunity for comment, prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes), consistent with the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes.

(B) Final regulations required

The Federal banking agencies and the National Credit Union Administration shall issue the regulations required under subparagraph (A) in final form before the end of the 6-month period beginning on the December 4, 2003.

(6) Coordination with other laws

No provision of this subsection shall be construed as altering, affecting, or superseding the applicability of any other provision of Federal law relating to medical confidentiality.

3. 15 U.S.C. 1681n (2006 & Supp. III 2009) provides:

Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance

For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

4. 15 U.S.C. 1681*o* provides:

Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

5. 15 U.S.C. 1681p provides:

Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in

controversy, or in any other court of competent jurisdiction, not later than the earlier of—

(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or

(2) 5 years after the date on which the violation that is the basis for such liability occurs.

6. 15 U.S.C. 1681u provides:

Disclosures to FBI for counterintelligence purposes

(a) Identity of financial institutions

Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish to the Federal Bureau of Investigation the names and addresses of all financial institutions (as that term is defined in section 3401 of title 12) at which a consumer maintains or has maintained an account, to the extent that information is in the files of the agency, when presented with a written request for that information, signed by the Director of the Federal Bureau of Investigation, or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this section. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing, that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activ-

ities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(b) Identifying information

Notwithstanding the provisions of section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment, to the Federal Bureau of Investigation when presented with a written request, signed by the Director or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this subsection. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) Court order for disclosure of consumer reports

Notwithstanding section 1681b of this title or any other provision of this subchapter, if requested in writing by the Director of the Federal Bureau of Investigation, or a designee of the Director in a position not lower than Deputy Assistant Director at Bureau headquarters

or a Special Agent in Charge in a Bureau field office designated by the Director, a court may issue an order ex parte directing a consumer reporting agency to furnish a consumer report to the Federal Bureau of Investigation, upon a showing in camera that the consumer report is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States. The terms of an order issued under this subsection shall not disclose that the order is issued for purposes of a counterintelligence investigation.

(d) Confidentiality

(1) If the Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, certifies that otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person, no consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall disclose to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the Federal Bureau of Investigation has sought or obtained the identity of financial institutions or a consumer report respecting any consumer under subsection (a), (b), or (c),

and no consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall include in any consumer report any information that would indicate that the Federal Bureau of Investigation has sought or obtained such information on a consumer report.

(2) The request shall notify the person or entity to whom the request is directed of the nondisclosure requirement under paragraph (1).

(3) Any recipient disclosing to those persons necessary to comply with the request or to an attorney to obtain legal advice or legal assistance with respect to the request shall inform such persons of any applicable nondisclosure requirement. Any person who receives a disclosure under this subsection shall be subject to the same prohibitions on disclosure under paragraph (1).

(4) At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under this section shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request, except that nothing in this section shall require a person to inform the Director or such designee of the identity of an attorney to whom disclosure was made or will be made to obtain legal advice or legal assistance with respect to the request for the identity of financial institutions or a consumer report respecting any consumer under this section.

(e) Payment of fees

The Federal Bureau of Investigation shall, subject to the availability of appropriations, pay to the consumer reporting agency assembling or providing report or information in accordance with procedures established under this section a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching, reproducing, or transporting books, papers, records, or other data required or requested to be produced under this section.

(f) Limit on dissemination

The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

(g) Rules of construction

Nothing in this section shall be construed to prohibit information from being furnished by the Federal Bureau of Investigation pursuant to a subpoena or court order, in connection with a judicial or administrative proceeding to enforce the provisions of this subchapter. Nothing in this section shall be construed to authorize or permit the withholding of information from the Congress.

(h) Reports to Congress

(1) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence and the Committee on Banking, Finance and Urban Affairs of the House of Representatives, and the Select Committee on Intelligence and the Committee on Banking, Housing, and Urban Affairs of the Senate concerning all requests made pursuant to subsections (a), (b), and (c) of this section.

(2) In the case of the semiannual reports required to be submitted under paragraph (1) to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, the submittal dates for such reports shall be as provided in section 415b of title 50.

(i) Damages

Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of—

(1) $100, without regard to the volume of consumer reports, records, or information involved;

(2) any actual damages sustained by the consumer as a result of the disclosure;

(3) if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and

(4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.

(j) Disciplinary actions for violations

If a court determines that any agency or department of the United States has violated any provision of this section and the court finds that the circumstances surrounding the violation raise questions of whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee who was responsible for the violation.

(k) Good-faith exception

Notwithstanding any other provision of this subchapter, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or identifying information pursuant to this subsection in good-faith reliance upon a certification of the Federal Bureau of Investigation pursuant to provisions of this section shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

***(l)* Limitation of remedies**

Notwithstanding any other provision of this subchapter, the remedies and sanctions set forth in this section shall be the only judicial remedies and sanctions for violation of this section.

(m) Injunctive relief

In addition to any other remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section. In the event of any successful action under this subsection, costs together with reasonable attorney fees, as determined by the court, may be recovered.

7. 28 U.S.C. 1346 provides in pertinent part:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

* * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contracts Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges,

or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * * * *

8. 28 U.S.C. 1491 provides in pertinent part:

Claims against United States generally; action involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * * * *

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 08-CV-7409

JAMES X. BORMES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: Dec. 30, 2008

CLASS ACTION COMPLAINT

Plaintiff James X. Bormes, on behalf of himself and all others similarly situated, brings this class action against Defendant the United States of America, and alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys:

NATURE OF THE CASE

1. In 2003, Congress passed, and the President signed, the Fair and Accurate Credit Transaction Act, P.L. 108-159 ("FACTA"), which amended the federal Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*

("FCRA"). FACTA was intended to help consumers fight the growing crimes of identity theft and credit and debit card fraud.

2. FACTA provides, *inter alia*, that:

> Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last five digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction. 15 U.S.C. § 1681c(g)

3. Despite knowing and being repeatedly informed about FACTA's credit and debit card truncation requirements, and despite having had more than five years to comply with the law, the United States of America (the "Government"), through one or more of its agencies, willfully violated 15 U.S.C. § 1681c(g) by printing expiration dates on credit or debit card receipts provided to cardholders, subjecting consumers to an increased risk of identity theft and credit and debit card fraud.

4. Plaintiff brings this action on behalf of himself and all others similarly situated and seeks statutory damages, costs and attorneys' fees.

JURISDICTION

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331, 15 U.S.C. § 1681p and 28 U.S.C. § 1346(a)(2) (the "Little Tucker Act").

6. The Little Tucker Act, provides, in relevant part, as follows:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

7. Plaintiff's claim against the Government is founded upon the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681 *et seq.* The FCRA is a money-mandating statute and can fairly be interpreted as mandating compensation by the Government for damages sustained and/or creating a substantive cause of action and/or right to recover money damages.

8. 15 U.S.C. § 1681n of the FCRA provides that:

> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000 . . .
>
> (2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

9. 15 U.S.C. § 1681a(a) defines the term "person" to include the government and governmental subdivisions or agencies:

> The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

10. 15 U.S.C. § 1681p further provides that:

> An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction.

11. The aforementioned statutes constitute an express waiver of the sovereign immunity of the United States of America.

VENUE

12. Venue is proper in this District pursuant to 28 U.S.C. § 1391, 28 U.S.C. § 1402 and 15 U.S.C. §1681p.

PARTIES

13. Plaintiff, James X. Bormes ("Bormes"), is and at all times relevant hereto was a resident of Cook County, Illinois. Plaintiff is an attorney and principal in the Law Office Of James X. Bormes, P.C., located at 8 South Michigan Avenue, Suite 2600, Chicago, Illinois.

14. Defendant is the United States of America (the "Government"), a sovereign entity and body politic and is responsible for the actions of its various agencies, including those listed in paragraph 16 hereof.

FACTS RELATING TO THE GOVERNMENT'S PAY.GOV SYSTEM

15. In October 2000, the Government, through the United States Department of the Treasury's Financial Management Service ("FMS"), launched Pay.gov, a web-based billing, collection and payment processing application that allows consumers to make online payments to various government agencies by credit or debit card.

16. Numerous agencies of the Government utilize the Pay.gov system to process online credit and debit card payment transactions, including the following:

- Department of Agriculture
- Department of Commerce
- Department of Defense
- Department of Education
- Department of Energy
- Department of Health and Human Services
- Department of Homeland Security
- Department of Housing and Urban Development
- Department of Justice
- Department of Labor
- Department of State
- Department of the Interior
- Department of the Treasury
- Department of Transportation
- Department of Veterans Affairs
- Environmental Protection Agency
- US District Courts

- US Bankruptcy Courts
- Corporation for National & Community Service
- Export/Import Bank
- Federal Communications Commission
- Federal Mediation Conciliation Service
- Federal Trade Commission
- General Services Administration
- Government Printing Office
- Library of Congress
- National Aeronautics and Space Administration
- National Archives and Records Administration
- National Credit Union Administration
- National Endowment for the Arts
- National Labor Relations Board
- National Park Foundation
- National Transportation Safety Board
- Nuclear Regulatory Commission
- Office of Personnel Management
- Peace Corps
- Railroad Retirement Board (RRB)
- Small Business Administration
- Social Security Administration
- Stennis Center for Public Service
- Tennessee Valley Authority

FACTS RELATING TO THE NAMED PLAINTIFF

17. On or about August 9, 2008, Plaintiff, on behalf of one of his clients, filed a lawsuit in the United States District Court for the Northern District of Illinois using its online CM/ECF document filing system. Plaintiff was required to pay $350 in filing fees.

18. Plaintiff paid the filing fees using his American Express credit card, which transaction was processed through the Government's Pay.gov system.

19. After submitting his payment, the Government provided Plaintiff an electronically printed receipt at the point of sale or transaction in the form of a confirmation webpage that was displayed on his computer screen. The Government also instructed Plaintiff to print copies of the confirmation screen receipt for his records, which Plaintiff did.

20. The Government further provided a copy of the electronically printed receipt to Plaintiff by emailing a copy to Plaintiff's email address.

21. The electronically printed receipt contained the last four digits of Plaintiff's credit card number, Plaintiff's credit card's expiration date, Plaintiff's name, Plaintiff's address, and the type of card Plaintiff used in the transaction.

FACTS RELATING TO THE IMPORTANCE OF TRUNCATING EXPIRATION DATES

22. The printing of expiration dates on customer receipts increases the possibility of both identity theft and credit card and debit card fraud.

23. Expiration dates are widely recognized by payment processors, merchants and others as an important security feature and are routinely used to validate and authenticate credit and debit card purchases. Unlike the account number on the credit or debit card, the expiration date cannot be deciphered through sophisticated mathematical modeling. Therefore, the expiration date is an important security check that (a) corroborates that a person attempting to use a given account number is actually the authorized user of the card and (b) the person making a purchase over the phone or online actually has the card in his or her possession.

24. Another widely recognized and routinely used security feature used to validate and authenticate credit or debit card transactions is the 3- or 4-digit Card Security Code ("CSC") or Card Verification Value or Code ("CVV," "CVV2" or "CVC") located on the back (or front, in the case of American Express) of most credit and/or debit cards.

25. One of the inputs used to calculate CSC, CVC and CVV security codes is the credit or debit card's expiration date. The printing of expiration dates on customer receipts increases the likelihood that a thief will be able to calculate a CSC or CVV security code and thereby bypass this additional security check.

26. In addition, expiration dates are often used by thieves to bolster their credibility when they attempt to dupe cardholders and others into disclosing other confidential financial information relating to the cardholder (i.e., by making pretext calls, by sending phishing emails, etc.). The more information that is disclosed on a receipt, the easier it is to pilfer additional confidential financial information.

27. Expiration dates are also one of the items contained in the magnetic strip of a credit card; having it is vital to a thief's ability to create a phony duplicate credit or debit card.

FACTS RELATING TO THE GOVERNMENT'S WILLFUL NONCOMPLIANCE WITH FACTA'S TRUNCATION REQUIREMENTS

28. Persons that accept credit and/or debit cards were given up to three years from the date FACTA was enacted to comply with its requirements (i.e., until December 4, 2006) with respect to devices in use prior to

January 1, 2005 and up to two years with respect to devices first put into use on or after January 1, 2005 (i.e., no later than January 1, 2005).

29. The Government knew of and was informed about the law requiring the truncation of credit and debit card numbers and prohibiting the printing of expiration dates on credit and debit card receipts. Indeed, the Government, through Congress and the President, enacted the law in 2003 and later amended it in 2007 via the Credit and Debit Card Receipt Clarification Act of 2007, H.R. 4008, clarifying that any person who provides a credit or debit card receipt on or after June 4, 2008 that includes a credit or debit card's expiration date in willful noncompliance of the statute will be subject to both statutory and punitive damages.

30. The FCRA and its truncation requirements have been widely discussed in the public domain among merchants, the government and the public at large, through media, trade associations, governmental agencies, banks, card issuers, and payment processors.

31. For instance, the Government, through the Federal Trade Commission ("FTC"), which has the authority to administratively enforce compliance with the FCRA and issue commentaries on the statute, twice provided notice in 2007 reminding the public of the requirement to truncate credit and debit card information on receipts.

32. On information and belief, VISA, MasterCard, and the PCI Security Standards Council—a consortium founded by VISA, MasterCard, Discover, American Express and JCB—and other companies that sell equipment and software for the processing of credit or debit card payments, and other entities, repeatedly informed

its customers, including the Government, about FACTA's truncation requirements, including its prohibition on the printing of more than the last five digits of card numbers or expiration dates on receipts.

33. On information and belief, Government agencies participating in the Pay.gov credit and debit card processing system, including the United States District Court for the Northern District of Illinois, were required to, and did, enter into Agency Participation Agreements ("APA") with the United States Department of the Treasury, Financial Management Service ("FMS") and agreed to be bound by FMS Card Processing Rules and Regulations, which require Government agencies to comply with, and be bound by, federal law and VISA, MasterCard, American Express and Discover Card rules and regulations, by-laws and policies:

> The Agency must comply with and be bound by the VISA, MasterCard, American Express and Discover Card Rules and Regulations ("Card Rules"). * * * The Agency also must comply with and be bound by the Visa U.S.A Inc. By-Laws and Operating Regulations, the Visa International Operating Regulations and any other rules, policies or requirements of Visa or any of its subsidiaries or affiliates (collectively "Visa Rules"), the MasterCard International Inc. By-Laws and Operating Regulations and any other rules, policies or requirements of MasterCard or any of its subsidiaries or affiliates (collectively "MasterCard Rules"), and the American Express Card Acceptance Operating Rules for the Federal Government, any of which may be altered or amended from time to time and without notice. The Agency agrees to follow and be bound by the rules and regulations

> of the aforementioned networks, as amended from time to time, to the extent that these rules and regulations do not conflict with federal law and/or the terms of the FMS Card Processing Rules and Regulations. In the event of a conflict, federal law and/or the terms of the FMS Card Processing Rules and Regulations shall govern.

FMS Card Processing Rules and Regulations at 1.

34. On information and belief, VISA, MasterCard, American Express and Discover Card rules and regulations, by-laws and/or policies also require customers to comply with federal law, including, specifically FACTA's truncation requirements.

35. State laws passed or introduced in at least thirty-four states, require that card numbers and expiration dates be excluded from printed credit and debit card receipts.

36. On information and belief, a substantial number of merchants and entities readily brought their credit card and debit card receipt processing equipment and software into compliance with FACTA. The Government could have done the same without difficulty.

37. On information and belief, it would have been a simple task for the Government to either reprogram its machines and software to not violate FACTA or purchase new machines and software that did not violate FACTA.

CLASS ACTION ALLEGATIONS

38. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure ("FRCP") on behalf of himself and the following class (the "Class"):

All individual cardholders who, on or after June 4, 2008, were provided an electronically printed receipt from the United States of America, or one of its agencies, wherein the receipt displayed more than the last five digits of the cardholders' credit card or debit card number and/or the expiration date of the card.

39. The Class consist of thousands of individuals and other entities, making joinder impractical, in satisfaction of FRCP 23(a)(1). The exact size of the Class and the identities of the individual members thereof are ascertainable through the Government's records, including but not limited to the Government's sales and transaction records.

40. The claims of Plaintiff are typical of the claims of the Class. The claims of the Plaintiff and the Class are based on the same legal theories and arise from the same unlawful and willful conduct, resulting in the same injury to the Plaintiff and the Class.

41. Plaintiff and the Class were customers of the Government, each having transacted business with the Government using a credit card and/or debit card. At the point of such sale or transaction with Plaintiff and the Class, the Government provided to Plaintiff and each member of the Class a receipt in violation of 15 U.S.C. § 1681c(g).

42. The Class has a well-defined community of interest. The Government has acted and failed to act on grounds generally applicable to the Plaintiff and the Class, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the Class.

43. There are many questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any questions that may affect only individual Class members within the meaning of FRCP 23(a)(2) and 23(b)(2).

44. Common questions of fact and law affecting members of the Class include, but are not limited to, the following:

a. Whether the Government's conduct of providing Plaintiff and the Class with a sales or transaction receipt whereon the Government printed more than the last five digits of the credit card or debit card number and/or the expiration date of the card violated the FACTA, 15 U.S.C. §§ 1681 *et seq.*;

b. Whether the Government's conduct was willful; and

c. Whether Plaintiff and members of the Class are entitled to statutory damages, costs and/or attorney's fees for the Government's acts and conduct;

45. Absent a class action, most class members would find the cost of litigating their claims to be prohibitive, and will have no effective remedy. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants, and promotes consistency and efficiency of adjudication.

46. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has retained counsel with substantial experience in prosecuting complex litigation and class actions. Plaintiff and his counsel are committed to vigorously prosecuting this action

on behalf of the other Class members, and have the financial resources to do so. Neither Plaintiff nor his counsel has any interest adverse to those of the other Class members.

COUNT I

(Violation of 15 U.S.C. § 1681 *et seq.*)

47. Plaintiff incorporates the foregoing allegations.

48. Title 15 U.S.C. § 1681c(g) provides, in relevant part, as follows:

> (1) *In general.* Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last five digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction.
>
> (2) *Limitation.* This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card

49. Title 15 U.S.C. § 1681n, entitled "Civil liability for willful noncompliance," in turn, provides, in relevant part, as follows:

> (a) *In general.* Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000;

* * *

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

50. The Government is a "person" within the meaning of 15 U.S.C. § 1681n.

51. Plaintiff and the Class are "consumers" within the meaning of 15 U.S.C. § 1681n and "cardholders" within the meaning of 15 U.S.C. § 1681c(g).

52. The Government transacts business in the United States and accepts credit cards and/or debit cards in the course of transacting such business.

53. The Government provided Plaintiff and the Class with one or more electronically printed receipts at the point of sale or transaction on which the Government printed more than the last five digits of Plaintiff's and the Class' credit or debit card number and/or expiration date.

54. Despite knowing and being repeatedly informed about FACTA and the importance on truncating credit card and debit card numbers and preventing the printing of expiration dates on receipts, and despite having had up to more than five years to comply with FACTA's requirements, the Government willfully violated and continues to violate FACTA's requirements by, *inter alia*, printing more than five digits of the card number

and/or the expiration date upon the receipts provided to Plaintiff and members of the Class.

55. The Government willfully violated FACTA in conscious disregard of the rights of Plaintiff and the members of the Class thereby exposing Plaintiff and the members of the Class to an increased risk of identity theft and credit and/or debit card fraud.

56. As a result of the Government's willful violations of FACTA, the Government is liable to Plaintiff and each member of the Class in the statutory damage amount of "not less than $100 and not more than $1000' for each violation." 15 U.S.C. § 1681n(a)(1)(A).

57. The Government conduct is continuing and, unless restrained, the Government will continue to engage in its willful conduct and consumers will continue to be at an increased risk of identity theft and credit and/or debit card fraud.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the Class, prays for the following relief:

a. An order certifying the Class and appointing Plaintiff as the representative of the Class, and appointing counsel for Plaintiff as lead counsel for the Class;

b. A judgment for and award of statutory damages to Plaintiff and the the [sic] Class pursuant to 15 U.S.C. § 1681n(a)(1)(A) for the Government's willful violations;

c. Payment of costs of suit herein incurred pursuant to, *inter alia*, 15 U.S.C. § 1681n(a)(3);

d. Payment of reasonable attorneys' fees pursuant to, *inter alia*, 15 U.S.C. § 1681n(a)(3); and

e. For such other and further relief as the Court may deem proper.

Dated: Dec. 30, 2008

JAMES X. BORMES, on his own behalf and on behalf of all others similarly situated,
By:
/s/ John G. Jacobs
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OPPOSITION BRIEF

FILED
DEC

No. 11-192

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES X. BORMES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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December 2011

QUESTION PRESENTED

Whether the Little Tucker Act's waiver of sovereign immunity for claims "against the United States founded ... upon ... any Act of Congress," 28 U.S.C. § 1346(a)(2), includes claims brought against the United States under the Fair Credit Reporting Act, which provides a cause of action for damages against the government. 15 U.S.C. §§ 1681a(b), 1681n, 1681o.

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Prepared Statement of the Federal Trade Commission on The Fair Credit Reporting Act: Before the S. Comm. on Banking, Housing, and Urban Affairs, 108th Cong. 6 (2003) 1

STATEMENT

A. Congress passed the Fair Credit Reporting Act (FCRA) "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). The FCRA provides a private right of action for damages against any "person" who violates its requirements. 15 U.S.C. § 1681c(g)(1). And it defines "person" to mean "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." *Id.* § 1681a(b).

Responding to a surge in identity theft that had "reached almost epidemic proportions," H.R. Rep. No. 108-263, at 25 (2003), Congress in 2003 amended the FCRA to "protect consumers from identity thieves" by "limit[ing] the number of opportunities for identity thieves to 'pick off' key card account information." S. Rep. No. 108-166, at 3 (2003). Identity theft occurs when someone uses another person's identifying information, such as a social-security number or credit account number, to fraudulently obtain credit, bank loans, employment, or utility or cell phone service. *See Prepared Statement of the Federal Trade Commission on The Fair Credit Reporting Act: Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 6 (2003). The Fair and Accurate Credit Transactions Act, enacted as an amendment to the FCRA, prohibits any "person" who "accepts credit cards or debit cards for the transaction of business" from "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1).

To ensure an adequate opportunity to comply with the law, the Federal Trade Commission extensively pub-

licized the new requirements, and Congress delayed implementation until January 1, 2005, for new credit-card receipt equipment, and until December 4, 2006, for equipment in use prior to January 1, 2005. *Id.* § 1681c(g)(3).

B. After the law's effective date, respondent James Bormes used the government's online pay.gov payment system to pay a $350 filing fee using his personal credit card. Pet. App. 86a. A receipt for the payment—displayed on his computer screen and sent in an emailed confirmation—included the credit card's expiration date. *Id.* at 87a. Bormes filed suit in the U.S. District Court for the Northern District of Illinois on behalf of himself and others similarly situated, alleging that the receipt violated § 1681c(g)(1)'s prohibition on printing a credit card's expiration date. *Id.* at 81a.

As the basis for jurisdiction in the district court, Bormes relied on the FCRA's jurisdictional provision, 15 U.S.C. § 1681p, which provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court." Pet. App. 82a-84a. In addition, Bormes alleged jurisdiction under the Little Tucker Act, which waives the United States's sovereign immunity for claims "founded ... upon ... any Act of Congress." *Id.* Together, the Tucker Act and Little Tucker Act allocate jurisdiction over claims against the United States based on the amount in controversy. The Tucker Act provides jurisdiction in the Court of Federal Claims for claims of any value. 28 U.S.C. § 1491(a)(1). The Little Tucker Act—under which Bormes alleged jurisdiction—provides concurrent juris-

diction in the federal district courts for claims "not exceeding $10,000 in amount." *Id.* § 1346(a)(2).[1]

The district court dismissed the case. Relying on this Court's holding that the United States is immune from suit "except where Congress has 'unequivocally expressed' a waiver of immunity," the court held that the FCRA's express application to any "government" did not "unequivocally express[]" a waiver because Congress did not "expressly insert[] the specific term 'United States' into the statutory language." Pet. App. 27a-28a (quoting *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992)). The court did not address Bormes's alternative claim that the Little Tucker Act independently waives the federal government's sovereign immunity for FCRA claims.

C. Bormes appealed the district court's decision to the Federal Circuit. Pet. App. 18a. Although the Seventh Circuit would ordinarily have had jurisdiction over an appeal from a decision of an Illinois federal district court, Bormes based his appeal on 28 U.S.C. § 1295(a)(2), which provides the Federal Circuit with exclusive jurisdiction over "an appeal from a final decision of a district court of the United States ... if the jurisdiction of that court was

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[1] Although the general Tucker Act expressly provides jurisdiction only to the Court of Federal Claims for claims of more than $10,000, this Court held in *Bowen v. Massachusetts* that the Act does not oust the district courts of their general federal-question jurisdiction. 487 U.S. 879, 891 & nn. 15-16, 91 (1988). Nevertheless, because the general Tucker Act conditions the government's waiver of sovereign immunity on filing in the Court of Federal Claims, a district court cannot—even if it has jurisdiction—award any relief unless the plaintiff can invoke a basis for waiver of immunity. *See Van Drasek v. Lehman*, 762 F.2d 1065, 1071 n.10 (D.C. Cir. 1985).

based, in whole or in part, on" the Tucker Act. Pet. App. 19a.

The government moved to transfer the case to the Seventh Circuit, arguing that the FCRA's jurisdictional provision controlled rather than the Little Tucker Act, and thus that the appeal should have been filed in the Seventh Circuit in accordance with 28 U.S.C. § 1291. Pet. App. 18a-22a. A motions panel of the Federal Circuit, however, disagreed, holding that the Federal Circuit was the proper forum for appeal of Bormes's claims because those claims were based in part on the Little Tucker Act. *Id.*

Following briefing and argument on the merits of the appeal, the Federal Circuit vacated the district court's decision. *Id.* at 1a-17a. The Federal Circuit held that the FCRA's creation of a cause of action against the "government"—which the government conceded at oral argument includes the United States—fell within the Little Tucker Act's waiver of immunity for claims "against the United States founded ... upon ... any Act of Congress." *Id.* Because Bormes's claims fell within the scope of the Little Tucker Act's waiver, and because Congress had not indicated its intent to withdraw the Little Tucker Act's remedy for FCRA claims, the Federal Circuit court concluded that the Little Tucker Act waived sovereign immunity for FCRA claims. *Id.* at 7a, 13a. The court did not reach the question whether the FCRA's provision of a cause of action against any "government" would have been sufficient, in the absence of the Little Tucker Act, to independently waive sovereign immunity. *Id.* at 7a-8a.

REASONS FOR DENYING THE PETITION

I. There is No Circuit Split on the Question Presented.

A. As the government acknowledges (at 8), there is no split among the courts of appeals on the question whether the Little Tucker Act waives the government's sovereign immunity for FCRA claims. On the contrary, the Federal Circuit below expressly followed the only other court of appeals decision to have addressed the question. *See* Pet App. 18a (relying on *Talley v. U.S. Dept. of Agric.*, 595 F.3d 754, 762 (7th Cir. 2010), *reh'g en banc granted, opinion vacated* (June 10, 2010), *aff'd by equally divided court*, 09-2123, 2010 WL 5887796 (7th Cir. Oct. 1, 2010)). Like the Federal Circuit here, Judge Easterbrook's opinion in *Talley* held that the FCRA's express provision of damages against any "government" falls within the Little Tucker Act's waiver of immunity for claims "founded ... upon ... any Act of Congress." 28 U.S.C. § 1346(a)(2). Although the Seventh Circuit later vacated that decision and granted rehearing en banc, the evenly divided en banc court reached the same result, without opinion. *Talley*, 2010 WL 5887796. Thus, no court of appeals has adopted a position contrary to the Federal Circuit's decision here.

The government argues that a split on the question presented is unlikely to develop because the Federal Circuit has exclusive jurisdiction over Little Tucker Act claims. But nothing prevents the government from appealing adverse sovereign-immunity decisions to the regional courts of appeals. *See, e.g., First Va. Bank v. Randolph*, 110 F.3d 75, 75 (D.C. Cir. 1997). In such an appeal, a regional court of appeals would be confronted with the question of whether it has appellate jurisdiction, or whether the Little Tucker Act vests exclusive jurisdiction with the Federal Circuit. *See Vietnam Veterans*

of Am. v. Sec'y of the Navy, 843 F.2d 528, 534 (D.C. Cir. 1988) (holding that the Little Tucker Act does not "creat[e] an exception to the general principle that a federal court may determine its own jurisdiction"). That jurisdictional issue turns on the same question as the issue of sovereign immunity—whether the district court had jurisdiction under the Little Tucker Act. *See United States v. Mitchell*, 463 U.S. 206, 216 (1983) ("If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit."); *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 927 (9th Cir. 2009) ("[T]he waiver of sovereign immunity is coextensive with the jurisdiction the statute confers."). For this reason, the regional courts of appeals can—and often do—decide questions of sovereign immunity under the Little Tucker Act. *See, e.g.*, Pet. App. 7a ("If the Little Tucker Act authorizes the district court to hear this case, it also provides the waiver of sovereign immunity ... ."); *Wopsock v. Natchees*, 279 F. App'x 679, 684 (10th Cir. 2008) ("For the Little Tucker Act to apply, and Federal Circuit jurisdiction to attach, a court must determine whether the substantive law can be fairly interpreted as mandating compensation by the Federal Government.").[2]

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[2] *See also, e.g.*, *Tootle v. Sec'y of Navy*, 446 F.3d 167, 174 (D.C. Cir. 2006) ("There cannot be exclusive jurisdiction under the Tucker Act if there is no jurisdiction under the Tucker Act."); *Dotson v. Griesa*, 398 F.3d 156, 177 (2d Cir. 2005) ("Because a finding of sovereign immunity would deprive this court of subject matter jurisdiction, we address that question first."); *Am. Fed'n of Gov't Employees Local 1 v. Stone*, 146 F. App'x 704, 705 (5th Cir. 2005) ("Our appellate jurisdiction in this case is limited initially to determining whether the district court had jurisdiction under the Little Tucker Act ... ."); *Kalodner v. Abraham*, 310 F.3d 767, 769 (D.C. Cir. 2002); *Randall v. United States*, 95 F.3d 339, 346 (4th Cir. 1996) (noting

(continued ...)

If, as the government contends, the Tucker Act does not apply to FCRA claims, then the regional circuits, rather than the Federal Circuit, have jurisdiction over FCRA appeals and could reach a result contrary to the Federal Circuit's decision here. *See Chabal v. Reagan*, 822 F.2d 349, 355 (3d Cir. 1987) (holding that the regional courts of appeals must examine whether a plaintiffs' claims properly fall under the Tucker Act even if it means disagreeing with the Federal Circuit); *Shaw v. Gwatney*, 795 F.2d 1351, 1353 (8th Cir. 1986) ("If we agree with the [government] that the district court acted beyond its power in awarding back pay, that court's decision could not have been based [on the Tucker Act] . . . , and we have jurisdiction . . . .").

Indeed, the government made precisely this argument below, urging that the case be transferred to the Seventh Circuit on the ground that Bormes's FCRA claims did not fall within the Little Tucker Act's waiver of sovereign immunity. *See* Pet. App. 11a. Accordingly, the government is wrong that this Court must decide this case in the absence of disagreement among the courts of appeals.

B. The Seventh Circuit's decision in *Talley* suggests a second means by which the regional circuits could decide the question presented. The plaintiff there, while invoking the Little Tucker Act for its waiver of sovereign immunity, relied for jurisdiction on the FCRA's separate grant of jurisdiction to the district courts, 15 U.S.C. § 1681p, and the general grant of federal-question jurisdiction under 28 U.S.C. § 1331. *Talley*, 595 F.3d at 762-63. As the now-vacated *Talley* opinion explained, the

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that analysis of appellate jurisdiction in a regional court of appeals requires a decision regarding the Tucker Act's waiver of sovereign immunity).

Tucker Act is "*both* a grant of jurisdiction and a waiver of sovereign immunity," and "if the plaintiff elects to use the latter without the former, then jurisdiction does not arise under the Tucker Act." *Id.*

In *Talley* and similar cases where the plaintiff does not invoke the Little Tucker Act as a basis for jurisdiction, the Federal Circuit's exclusive jurisdiction over appeals of claims arising under the Little Tucker Act does not apply. *See* 28 U.S.C. § 1295(a)(2) (providing exclusive Federal Circuit jurisdiction over claims in which jurisdiction is based on the Little Tucker Act). The regional courts of appeals in such cases are thus free to independently interpret the scope of the Little Tucker Act's waiver as applied to the FCRA and, potentially, to disagree with the Federal Circuit's interpretation here. *See Talley*, 595 F.3d at 762 ("[T]he only way to determine what role this court plays has been to determine whether and how the Tucker Act applies."); *see also First Va. Bank*, 110 F.3d at 77 (holding that cases "rest[ing] on some other provision of federal law for the requisite governmental consent to suit ... are to be heard in the regional courts of appeals, not the Federal Circuit").

C. That only two decisions of the courts of appeals have addressed the question presented reflects the relative newness of the FCRA claims at issue—which did not come fully into effect until December 4, 2006, 15 U.S.C. § 1681c(g)(3)—rather than a structural barrier to review in the regional circuits. Indeed, the government does not identify even district court decisions, other than those below and in *Talley*, that have yet decided the question presented here. In the absence of *any* decision adopting the government's position, there is no need for this Court to intervene.

II. The Federal Circuit Correctly Held that Congress Waived Sovereign Immunity for FCRA Claims.

The FCRA subjects any "person"—which the Act expressly defines to include any "government"—to monetary liability for violating its prohibitions. 15 U.S.C. §§ 1681a(b), 1681n, 1681o. The government argues that the FCRA's provision of a cause of action against the government does not bring the FCRA within the Little Tucker Act's waiver of sovereign immunity for claims brought under "any Act of Congress," but instead implicitly *revokes* the Little Tucker Act's waiver. At the same time, however, the government contends that the FCRA's "detailed remedial regime" demonstrates Congress's intent to provide *no* remedy for monetary claims against the government. Pet. 9-10. The upshot of the government's argument is that Congress, by expressly creating a cause of action for damages against the "government," succeeded only in *eliminating* any means for obtaining that monetary relief. Nothing in this Court's decisions supports that illogical result.

A. The FCRA Does Not Demonstrate Congress's Intent to Withdraw the Little Tucker Act's Sovereign-Immunity Waiver.

1. A waiver of sovereign immunity requires a "clear statement from the United States of its intent to subject the government to suit." *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472-73 (2003). This Court has long held, however, that the Little Tucker Act contains the requisite clear language. *See id.* The Act provides that "[t]he district courts shall have original jurisdiction" over "[a]ny ... civil action or claim against the United States, not exceeding $10,000 in amount" that is founded on, among other things, "any Act of Congress." 28 U.S.C. § 1346(a)(2). In light of that existing waiver, the right to bring a damages claim against the govern-

ment requires only a statute creating a right of recovery against the government. *White Mt. Apache Tribe*, 537 U.S. at 473. Congress "need not provide a second waiver of sovereign immunity." *White Mt. Apache Tribe*, 537 U.S. at 472-73 (quoting *Mitchell*, 463 U.S. at 218-19).

As the Federal Circuit recognized, the FCRA easily passes that threshold—it is an "Act of Congress" that expressly provides for monetary damages against the "government." Because it falls within the scope of the Little Tucker Act's waiver, the FCRA need not contain an *additional* plain statement waiving immunity. The government argues—without citation to authority—that the Little Tucker Act's waiver is limited to "certain substantive rights as to which no complete damages remedy has otherwise been provided," and thus does "not apply to statutes that, like the FCRA, have their own self-contained remedial schemes." Pet. 11. The Act, however, contains no such limitation. Rather, it applies by its express terms to claims arising under "*any* Act of Congress." 28 U.S.C. § 1346(a)(2) (emphasis added).

The government relies for its contrary reading on this Court's cases holding that the Act's waiver extends even to claims that lack an express provision for relief, as long the statute is "reasonably amenable to the reading that it mandates a right of recovery in damages." *White Mt. Apache Tribe*, 537 U.S. at 473. For example, the Court has found a waiver of immunity for claims brought under the Takings Clause based on the Fifth Amendment's provision for "just compensation," although the Fifth Amendment contains no express cause of action for an award of damages. *See Preseault v. ICC*, 494 U.S. 1, 14 (1990). That the Little Tucker Act waives sovereign immunity even in the absence of an express damages provision, however, does not suggest the *lack* of a waiver when a statute does expressly provide for such relief. On the contrary, this Court has stressed that, because the

Tucker Act does not itself create a substantive right to recover money damages, litigants "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions"—such as the specific FCRA provisions at issue in this case. *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). To adopt the government's position would mean that, by providing in the FCRA for damages against the "government," Congress *withdrew* a waiver of sovereign immunity that—in the absence of the provision—would otherwise have been available.

2. The cases on which the government relies do not support its contention that the Tucker Act is inapplicable to any statute providing its own "comprehensive remedial regime." Those cases involved statutes demonstrating Congress's intent "to preclude judicial review" of previously available claims. *United States v. Fausto*, 484 U.S. 439, 443-44 (1988). In *Fausto*, for example, this Court reversed the Federal Circuit's holding that the Tucker Act waived sovereign immunity for claims under the Back Pay Act. *Id.* at 443. The Court relied on another statute—the Civil Service Reform Act—in which Congress had "deliberate[ly] excluded ... employees in respondent's service category" from entitlement to such relief. *Id.* at 455. To nevertheless allow the claims to proceed under the Tucker Act, the Court concluded, would allow employees to circumvent Congress's statutory scheme. *Id.* Similarly, the Court in *Brown v. General Services Administration* held that Title VII withdrew the Tucker Act's grant of jurisdiction by "unambiguous[ly]" demonstrating an intent to "create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." 425 U.S. 820, 834 (1976); *see also Hinck v. United States*, 550 U.S. 501 (2007) (holding that the Internal Revenue Code established Congress's intent to establish exclusive juris-

diction in the Tax Court over claims to abate interest on federal taxes).

As these cases recognize, Congress has in limited circumstances "withdrawn the Tucker Act grant of jurisdiction" through subsequently-enacted legislation. *Preseault*, 494 U.S. at 12. But this Court will not "presume" that subsequent legislation "worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed." *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (internal quotation marks omitted). As the Court has repeatedly held, "a Tucker Act remedy exists unless there are unambiguous indications to the contrary." *Preseault*, 494 U.S. at 13; *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-19 (1984); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 126-36 (1974).[3]

Unlike the statutes at issue in the cases on which the government relies, nothing in the FCRA suggests that Congress intended to withdraw jurisdiction under the Little Tucker Act. Far from expressing an "unambiguous intention to withdraw the Tucker Act remedy," *Preseault*, 494 U.S. at 12, the FCRA provides a cause of action for damages against the "government." If Congress intended the FCRA to *eliminate* the possibility of obtaining monetary relief, it could not have chosen a more misleading way of expressing it.

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[3] *See also Slattery v. United States*, 635 F.3d 1298, 1315 (Fed. Cir. 2011) (rejecting the government's argument that that the FDIC statute withdrew Tucker Act jurisdiction because "[a]ny such withdrawal must be specific and unambiguous"); *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997) (holding that appellants "clearly [we]re entitled to bring a Tucker Act claim" under the Alaska Native Claims Settlement Act "because Congress did not explicitly preclude such suits when it enacted" the statute).

3. None of the features of the FCRA on which the government relies to show the statute's "comprehensive" nature distinguish the statute from other typical federal statutory causes of action.

First, the FCRA's grant of jurisdiction to federal district courts is merely an application of the default rule that the district courts have jurisdiction over "all civil actions arising under the ... laws ... of the United States." 28 U.S.C. § 1331. Because district court jurisdiction is *always* available over causes of action created by federal law, to hold that such jurisdiction conflicts with the Little Tucker Act would entirely eliminate the Act's application to claims brought under "any Act of Congress."

Fortunately, there is no such conflict. On the contrary, the Little Tucker Act *itself* provides jurisdiction in the district courts for claims of $10,000 or less. And although the general Tucker Act, on its face, grants jurisdiction only to the Court of Federal Claims, Congress's grant of jurisdiction to one court does not withdraw jurisdiction from another unless Congress specifies that the grant is exclusive. *See Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990); *Tafflin v. Levitt*, 493 U.S. 455 (1990). As this Court has recognized, the Tucker Act's grant of jurisdiction to the Court of Federal Claims does not expressly oust the district courts of their concurrent federal-question jurisdiction under § 1331. *See Bowen*, 487 U.S. at 891 & nn. 15-16, 91. Jurisdiction in the district courts thus remains available for all Tucker Act claims.

To be sure, the Tucker Act limits its waiver of sovereign immunity to actions filed in the Court of Federal Claims, thus requiring plaintiffs—as a practical matter—to file there when seeking more than the Little Tucker Act's limit of $10,000. But nothing prevents FCRA plain-

tiffs from filing such cases in the Court of Federal Claims. The FCRA does not provide that district court jurisdiction is *exclusive*, as this Court would require before finding withdrawal of the Tucker Act's grant of jurisdiction to the Court of Federal Claims. *See Donnelly*, 494 U.S. 820; *Tafflin*, 493 U.S. 455. Rather, the FCRA provides for jurisdiction in both the district courts and "*any other court of competent jurisdiction.*" 15 U.S.C. § 1681p; *see Baird v. United States*, 04-1454C, 2006 WL 1516069 (Fed. Cl. June 1, 2006) ("The Court is not persuaded, however, that ... claims arising under the FCRA necessarily fall outside the scope of its jurisdiction."). Jurisdiction over damages claims against the government under the FCRA and the Tucker Act is thus coextensive: under either statute, plaintiffs may file in district court, but are limited to the Court of Federal Claims if they wish to recover more than $10,000.

Moreover, even where Congress *has* demonstrated its intent to subject claims to differential treatment by directing claims to a special court, this Court has held that the Tucker Act remedy remains available. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102 at 126-36 (holding that Congress's provision for a special three-judge district court did not conflict with the Tucker Act's remedies). If a provision for a special three-judge court is not inconsistent with the Tucker Act, provision for jurisdiction in the district courts—the default for federal causes of action—is surely not inconsistent either.

Second, the government argues that the FCRA's two-year statute of limitations conflicts with the default six-year limitations period for Tucker Act claims set forth in 28 U.S.C. § 2501. Once again, the government's argument, if correct, would mean that the Tucker Act conflicts with nearly every cause of action arising under federal law. Limitations periods are widespread among

federal statutes, and even statutes lacking such provisions are subject to a default limitations period of four years. *See* 28 U.S.C. § 1658(a) ("Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.").

The Tucker Act's waiver of immunity for claims arising under "any Act of Congress" is not limited to statutes that provide the same limitations period as that Act. As this Court has explained, Congress intended the Tucker Act's six-year limit "merely to place an outside limit on the period within which all suits might be initiated," leaving Congress free to "provide less liberally for particular actions which, because of special considerations, required different treatment." *United States v. A.S. Kreider Co.*, 313 U.S. 443 (1941). When a statute provides a shorter period, as the FCRA does here, the shorter period governs. *See United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 8 (2008).

Third, the government asserts that, because the FCRA provides for remedies under a negligence standard, its cause of action is a claim in "tort" that is excluded under the Tucker Act. Pet. 18-19. But a tort is a common-law cause of action under state law, not a federal-law statutory claim. *See* 28 U.S.C. 1346(b)(1); *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994). For this reason, the government acknowledges that an FCRA claim is not a tort within the meaning of the Federal Tort Claims Act. Pet at 19-20. Neither logic nor authority supports the proposition that a claim can properly be characterized as a tort for purposes of the Little Tucker Act and, at the

same time, a non-tort for purposes of the Federal Tort Claims Act.[4]

The only case on which the government relies in support of its argument—this Court's 1894 decision in *Schillinger v. United States*—rejected a patent claim premised on an alleged violation of the Takings Clause. 155 U.S. 163 (1894). *Schillinger* was decided before Congress enacted the Patent Act of 1910, and thus was not based on an "Act of Congress." *See Zoltek Corp. v. United States*, 442 F.3d 1345, 1351 (Fed. Cir. 2006). After the Patent Act was promulgated, however, this Court recognized that Congress had "add[ed] the right to sue the United States in the court of claims" for patent infringement. *Crozier v. Fried. Krupp Aktiengesell-schaft*, 224 U.S. 290, 304 (1912).

Fourth, the remaining features of the FCRA singled out by the government—its inclusion of a class of potential plaintiffs, a standard of review, and authorization for judicial relief, Pet. 13—are not only consistent with the Little Tucker Act, but essential to a statutory cause of action. Because the Little Tucker Act does not itself create a substantive right to recover money damages, litigants must base their claims on "specific rights-creating or duty-imposing statutory ... prescriptions." *Navajo Nation*, 537 U.S. at 506. To conclude that the Act excludes any statute that creates a class of plaintiffs, standards for defendants to violate, or authorization for

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[4] As Judge Easterbrook noted in the Seventh Circuit's now-vacated decision in *Talley*, many torts are subject to standards of liability other than negligence. *Talley*, 595 F.3d at 761. Thus, by the government's logic, "the Tucker Act would not apply to *any* statutory claim, for all statutes use one or more of strict liability, bad intent, or failure to take appropriate precautions." *Id.*; *see also* Pet. App. 15a.

relief would render meaningless Congress's waiver of sovereign immunity for claims brought under "any Act of Congress."

B. The FCRA Creates A Damages Remedy Against the United States.

Much of the government's petition is devoted to a question not reached by the court below—whether, setting aside the Tucker Act, the FCRA independently waives sovereign immunity. The Federal Circuit, agreeing with the Seventh Circuit's vacated opinion in *Talley*, found it unnecessary to decide this question because it found that the Tucker Act provides the necessary waiver. The FCRA's waiver of sovereign immunity, however, provides an independent basis for affirming the Federal Circuit.

The FCRA's plain language subjects any "person" who willfully or negligently fails to comply with the Fair Credit Reporting Act to liability for damages. 15 U.S.C. §§ 1681n, 1681o. The Act defines "person" to include "any ... government or governmental subdivision or agency." *Id.* § 1681a(b). Indeed, the government concedes that the word "government" includes the United States. *See* Pet. 22; Pet. App. 10a-11a (noting government's concession at oral argument). The government suggests no way to interpret the FCRA's creation of a cause of action against the United States as anything other than a waiver of sovereign immunity.

The government nevertheless argues that an express waiver is lacking because, when amending the FCRA in 1984 to create a cause of action against any "person" for printing credit card numbers and expiration dates, Congress did not "unequivocal[ly]" state that the word "person," already defined in the FCRA to include the "government," would retain its statutory meaning. Pet. 22-23. In support of this position, the government

points to cases in which this Court rejected a literal application of statutory language where legislative history strongly indicated that the application had not been anticipated by Congress. *Id.*

The FCRA, however, does not involve a convoluted or unexpected application of statutory language. On the contrary, Congress used the word "person" in the same sentence in which it created a cause of action for monetary damages. Congress is presumed to have chosen carefully the words it uses in a statute. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). That principle is no less true when interpreting statutes that waive sovereign immunity. *See Molzof v. United States*, 502 U.S. 301, 307-08 (1992) (following in a sovereign immunity case the "cardinal rule of statutory construction" that Congress is aware of established definitions of the words it uses); *see also Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008) (declining to rely on presumption against waiver of sovereign immunity when there was no "ambiguity left ... to construe"); *United States v. Rice*, 327 U.S. 742 (1946) (same). As this Court has explained: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced." *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 (1949).

Thus, even if the government could point to evidence in the statute's legislative history indicating that Congress was not aware of its own definition of the word "person," that would not be enough to abrogate the statute's plain language. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (refusing to rely even on apparently clear statements in legislative history

to override a facially applicable congressional grant of jurisdiction to the federal courts). The government, here, in any case, identifies no such evidence. If the *absence* of evidence that Congress meant what it said were sufficient to cast doubt on a statute's plain meaning, it would require Congress to reaffirm the meaning of statutory definitions every time it amends a statute, or force courts to examine extrinsic evidence to determine whether Congress sufficiently understood what it was doing. "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

No. 11-192

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES X. BORMES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 11-192

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES X. BORMES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Federal Circuit held in this case that even if the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, does not itself waive the sovereign immunity of the United States to allow damages actions for violations of its general substantive provisions, the Tucker Act (28 U.S.C. 1491(a)(1)) and Little Tucker Act (28 U.S.C. 1346(a)(2)) independently supply such a waiver. As the petition explains, the methodological and practical consequences of that erroneous decision are far-reaching and warrant this Court's review. As a methodological matter, the decision expressly creates a "less stringent" (Pet. App. 14a) alternative to the well-established rule that waivers of sovereign immunity must be "unequivocally expressed in the statutory text." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (quotation marks omitted). In the Federal Circuit's view, even if a statute's own comprehensive remedial scheme fails to provide such a clear waiver of the

United States' sovereign immunity against damages claims, a plaintiff can invoke the Tucker Act and ask the Federal Circuit to infer an implicit damages remedy against the United States. As a practical matter, the decision exposes the United States potentially to billions of dollars in damages for violations of the numerous substantive FCRA provisions that regulate activities in which the government ubiquitously engages. Pet. 28-33.

Respondent does not deny the importance of this case. Instead, he suggests that review is unwarranted because (1) there is no circuit conflict, and (2) the Federal Circuit's decision is correct. Respondent's first suggestion lacks merit because (among other things) the decision below provides a clear path for all FCRA claims against the United States to fall within the jurisdiction of the Federal Circuit, and thus a circuit conflict is unlikely ever to develop. And respondent's defense of the decision below is flawed because, among other errors, he attempts to reframe the question presented in a way that presupposes that FCRA itself "provides a cause of action for damages against the government," Br. in Opp. i—an erroneous premise that neither the Federal Circuit nor any other court of appeals has embraced.

Although the question presented warrants plenary review, the Court's resolution of *First American Financial Corp.* v. *Edwards*, No. 10-708 (argued Nov. 28, 2011), may have a bearing on whether respondent has Article III standing to pursue his statutory-damages claims under FCRA. It may therefore be appropriate in the first instance to hold this petition pending that decision.

A. The Question Presented Is Important And Warrants Review

There is no dispute about the significance of the question presented. The petition explains (Pet. 28-33) the enormous impact of imposing FCRA liability on the United States, and points out that the Federal Circuit's methodological errors, if applied to other statutes, would expand the liability of the United States (and the Federal Circuit's own jurisdiction) much further. Respondent does not even attempt to downplay these concerns. Respondent nevertheless suggests (Br. in Opp. 5-8) that the Court should await the development of a circuit conflict before addressing them. That suggestion is misplaced. Even assuming it were otherwise appropriate that the United States be exposed to expansive and unwarranted liability unless and until a circuit conflict arises, no conflict is likely ever to develop on the question presented here.

Under the Federal Circuit's decision, a FCRA plaintiff will be able to assure that his claim against the United States is governed by Federal Circuit law by simply filing his suit in the Court of Federal Claims. The Court of Federal Claims has nationwide jurisdiction over any Little Tucker Act or Tucker Act claim. See 28 U.S.C. 1346(a)(2), 1491(a)(1). Thus, as respondent appears to recognize (Br. in Opp. 13-14), the Federal Circuit's decision allows any FCRA plaintiff (and would affirmatively require those with claims greater than $10,000) to sue the United States in that forum. And any appeal from the Court of Federal Claims goes exclusively to the Federal Circuit. 28 U.S.C. 1295(a)(3). With such an obvious incentive to forum-shop, a plaintiff is exceedingly unlikely to create a situation in which a regional circuit, rather than the Federal Circuit, could review the viability of his FCRA claim against the United States.

Moreover, because the Federal Circuit also has jurisdiction over appeals from Little Tucker Act suits filed in district court, 28 U.S.C. 1295(a)(2), review of the question presented by a regional circuit is by no means assured even if a plaintiff were to file a FCRA suit in district court. If the government prevails in district court, the plaintiff can appeal to the Federal Circuit, which (as in this case) will refuse to transfer the appeal to the regional circuit. See Pet. App. 18a-22a. The only way that the regional circuit might address the question presented is if the government loses in district court, ignores the Federal Circuit's decision in this case by appealing to the regional circuit, avoids having the regional circuit summarily transfer the appeal to the Federal Circuit, and argues that the regional circuit has jurisdiction because the Little Tucker Act does not apply to FCRA. Br. in Opp. 5. The government's ability to obtain review of an important question in this Court should not hinge on its ability to convince a regional circuit to disagree with the Federal Circuit on a Tucker Act question—particularly when the government has no control over whether (or when) it will even get the chance to try.

Respondent alternatively relies on a vacated Seventh Circuit decision, *Talley* v. *United States Dep't of Agriculture*, 595 F.3d 754 (2010), vacated on reh'g en banc, No. 09-2123, 2010 WL 5887796 (7th Cir. Oct. 1, 2010), for the proposition that a regional circuit could hear an appeal from a district-court FCRA suit in which the plaintiff does not rely on the Little Tucker Act as a grant of jurisdiction, but only as a waiver of sovereign immunity. Respondent fails to explain why a plaintiff would ever file a suit like that (or, for that matter, file in district court at all). In any event, such a suit would be improper for a reason separate from the question presented here—namely, that the Little Tucker Act's waiver of sovereign immunity is not freestanding.

The statute speaks solely in jurisdictional terms, see 28 U.S.C. 1346(a)(2), and its waiver of sovereign immunity is simply one consequence of—and therefore is dependent upon—a plaintiff's invocation of that jurisdictional grant. See *United States* v. *Navajo Nation*, 556 U.S. 287, 290 (2009) (describing the Tucker Act and Indian Tucker Act as "simply jurisdictional provisions that operate to waive sovereign immunity").

B. The Federal Circuit Erred In Concluding That The Tucker Act Subjects The United States To Liability Under FCRA

For the reasons explained in the petition (Pet. 9-28), the Federal Circuit's decision in this case is insupportable and conflicts with a number of decisions of this Court.

1. a. The Federal Circuit held that respondent can bring a damages claim against the United States for a violation of FCRA. Importantly, however, it did not conclude that FCRA's own general civil-remedies provisions, 15 U.S.C. 1681n (2006 & Supp. IV 2010) and 1681*o*, by themselves permit such a suit. Indeed, the Federal Circuit acknowledged that there is a substantial "question" whether Sections 1681n and 1681*o* contain the unequivocal textual waiver of the United States' sovereign immunity that this Court's precedents require, and it declined to resolve that question. Pet. App. 14a. It instead relied on the Tucker Act to supply the waiver of sovereign immunity that would be required to sue the United States under Sections 1681n and 1681*o*.

In contrast to the Federal Circuit, respondent for the most part presupposes that FCRA "expressly provides for monetary damages against the government." Br. in Opp. 10 (internal quotation marks omitted). He thereby skips over the Federal Circuit's most fundamental methodological error: its belief that the United States could be liable

under FCRA even if Congress did *not* expressly provide for such liability in FCRA's own remedial scheme. In crafting that remedial scheme, Congress would have understood, and relied upon, the traditional rule that an intent to expose the United States to damages must be clearly expressed in the statutory text. *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992). Neither the Federal Circuit nor respondent has cited any decision holding that a remedial scheme of broad applicability to the public at large, and that omits an unambiguous conferral of a right to sue the United States, might nevertheless expose the United States to damages under the Tucker Act. And with good reason: the focus of the Tucker Act is to allow an award of money damages based on contracts and statutes specifically involving government operations that may fairly be interpreted as money-mandating, not to subject the United States to damage awards based on claims of violations of statutes of general applicability that create causes of action sounding in tort. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 398 (1976); pp. 7-9, *infra*.

As the petition explains (Pet. 11-17), this Court has repeatedly held that the existence of a specific remedial scheme precludes resort to the Tucker Act's more generalized one. Respondent suggests (Br. in Opp. 11-12) that the particular statutes in those cases were uniquely preclusive of a Tucker Act remedy. But the only thing that made those statutes special was a feature that FCRA shares: the presence of "a precisely drawn, detailed" remedial scheme that "pre-empts more general remedies." *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 834 (1976).

b. Respondent further confuses the issue in this case by framing his argument around the question whether Sections 1681n and 1681o "*withdrew* a waiver of sovereign immunity" that "would otherwise have been available." Br. in

Opp. 11. The question here is not whether Congress "withdrew" a sovereign-immunity waiver for FCRA claims; the question is whether such a waiver exists at all.

In pressing his "withdrawal" argument, respondent quotes *Preseault* v. *ICC*, 494 U.S. 1, 13 (1990), for the proposition that there should be a Tucker Act remedy for FCRA violations "unless there are unambiguous indications to the contrary." Br. in Opp. 12. Not even the Federal Circuit adopted that rule, which would effectively reverse the normal sovereign-immunity clear-statement canon and make damages remedies against the United States the rule rather than the exception. *Preseault* does not support such a proposition. *Preseault*, like other cases cited by respondent, did not consider whether a statute was itself amenable to a Tucker Act remedy, but instead considered whether a statute eliminated a long-recognized Tucker Act remedy for violations of the Fifth Amendment's Just Compensation Clause. See *Preseault*, 494 U.S. at 13-17; *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1017-1019 (1984); *Blanchette* v. *Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 125-136 (1974) (*Regional Rail Reorg. Act Cases*). No similar issue is implicated here.

2. The petition additionally explains (Pet. 17-22) why, even assuming the Tucker Act's "fair inference" rule could supplant the established clear-statement rule for determining whether a statute's self-contained remedial scheme permits suits for money damages against the United States, conflicts between FCRA and the Tucker Act preclude a Tucker Act remedy here. To the extent respondent engages that discussion, rather than simply presuming that FCRA already supplies a cause of action against the United States, he fares no better than the Federal Circuit in trying to reconcile the conflicts. Br. in. Opp. 13-17.

In particular, respondent, like the Federal Circuit, fails to explain how application of the Tucker Act can be reconciled with FCRA's own jurisdictional provision, 15 U.S.C. 1681p. As the petition explains (Pet. 17-18), even if Section 1681p could be construed to permit the filing of a FCRA suit in the Court of Federal Claims, it also *always* permits such a suit to be filed in district court. Even respondent agrees (Br. in Opp. 13), however, that the Tucker Act requires claims against the United States over $10,000 to be filed exclusively in the Court of Federal Claims.

Respondent asserts (Br. in Opp. 14) that this Court has ignored a similar jurisdictional conflict before. Again, however, he relies on an inapposite case in which the issue was whether a particular statute withdrew a previously recognized Tucker Act remedy for Just Compensation Clause violations. See *Regional Rail Reorg. Act Cases*, 419 U.S. at 125-136. That decision did not address whether the Tucker Act can be applied to a statute that contains a specific remedial scheme and that has its own jurisdictional provision in conflict with the Tucker Act's.

Respondent also misconstrues this Court's precedents in contending (Br. in Opp. 16) that the Tucker Act's exclusion of "claims sounding in tort" has no application to federal statutory torts like FCRA claims. As the petition discusses (Pet. 19), this Court in *Schillinger* v. *United States*, 155 U.S. 163, 169 (1894), looked to the statutory cause of action for patent infringement in concluding that patent infringement is a "tort" for Tucker Act purposes. Respondent's observation (Br. in Opp. 16) that, several years after *Schillinger*, Congress expressly waived the United States' sovereign immunity against claims of patent infringement does nothing to undermine *Schillinger*'s recognition that statutory patent-infringement suits are "torts."

3. The final section of respondent's brief (Br. in Opp. 17-19) is devoted to defending the proposition that he elsewhere simply presumes—namely, that Sections 1681n and 1681*o* themselves provide a cause of action against the United States. Compare, *e.g.*, *id.* at 10 (asserting, without extended discussion, that FCRA is money-mandating because it "expressly provides for money damages against the 'government'"), with *id.* at 17 (characterizing textual analysis of FCRA as providing "an independent basis for affirming the Federal Circuit"). As previously discussed (pp. 5-6, *supra*), however, the interpretation of FCRA to determine whether it contains the requisite clear waiver of sovereign immunity for a damages suit against the United States is not directly at issue in this case. The issue in this case is instead whether the Tucker Act permits a court to *avoid* that inquiry by applying a looser standard.

In any event, respondent fails to demonstrate that FCRA even meets the Federal Circuit's own "fair inference" standard, let alone the normal clear-statement rule, for finding congressional intent to expose the United States to damages. As the petition explains (Pet. 22-28), although the government has acknowledged that the term "person" might include the United States in some FCRA contexts, it would be implausible for it to have that meaning in every section in which it appears (such as FCRA's criminal-penalty provision). The definition of "person" in each section of FCRA accordingly depends on context. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343-344 (1997). Respondent offers no support for the proposition that Congress intended the term "person" in the civil-remedies provisions to include all government entities—a definition that not only would have exposed the United States to billions of dollars in damages without any congressional discussion or debate, but also would have run directly afoul of this Court's just-

issued decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), by authorizing suits against States. The established clear-statement rule precludes such a result for both the United States and individual States.

C. The Court May Wish To Hold This Petition Pending The Decision In *First American Financial*

Rather than immediately granting plenary review, however, it may be appropriate for the Court to hold this case pending its decision in *First American Financial*. In *First American Financial*, the Court is considering when a plaintiff has Article III standing to seek statutory damages for a violation of the anti-kickback provision of the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2607. The petitioner in that case contends that a plaintiff lacks standing unless she can establish that "the alleged violation of RESPA affected the price, quality, or other characteristics" of the real-estate settlement services she received. Pet. Br. i, *First Am. Fin. Corp.*, *supra* (No. 10-708).

The government has filed an amicus brief disagreeing with that view. But if the Court were to agree with the petitioner in *First American Financial*, the Court's rationale could raise questions concerning petitioner's Article III standing to bring the FCRA claim at issue here. The briefs in *First American Financial* discuss certain similarities between suits under the RESPA provision at issue there and suits based on violations of the FCRA provision at issue here, 15 U.S.C. 1681c(g). See U.S. Amicus Br. 25-26, Reply Br. 20, *First Am. Fin. Corp.*, *supra* (No. 10-708). And although FCRA is different from RESPA because it protects information concerning the plaintiff, respondent here, in seeking statutory damages, has not alleged that he (or any other putative classmember) has suffered the sort of injury

the petitioner in *First American Financial* contends is required for Article III standing. See Pet. App. 81a-97a.

The Court therefore may wish to hold this petition until it issues its decision in *First American Financial*. If that decision calls into question respondent's standing here, the Court should grant this petition, vacate the decision below, and remand the case to the Federal Circuit to address the standing issue in the first instance. Otherwise, the Court should grant the petition and resolve the question presented.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending this Court's decision in *First American Financial Corp.* v. *Edwards*, No. 10-708 (argued Nov. 28, 2011), and then should be granted if the Court's decision in that case does not call into question respondent's standing here.

Respectfully submitted.

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DECEMBER 2011

PETITIONER'S BRIEF

No. 11-192

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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QUESTION PRESENTED

Whether the Little Tucker Act, 28 U.S.C. 1346(a)(2), waives the sovereign immunity of the United States with respect to damages actions for violations of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*

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In the Supreme Court of the United States

No. 11-192

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES X. BORMES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 626 F.3d 574. The court of appeals' denial of the government's motion to transfer the appeal to the Seventh Circuit (Pet. App. 18a-22a) is not published in the Federal Reporter, but is available at 2010 WL 331771. The opinion of the district court (Pet. App. 23a-30a) is reported at 638 F. Supp. 2d 958.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2010. A petition for rehearing was denied on March 15, 2011 (Pet. App. 31a-32a). On June 3, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July

13, 2011. On July 1, 2011, the Chief Justice further extended the time to August 12, 2011, and the petition was filed on that date. The petition was granted on January 13, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Little Tucker Act, 28 U.S.C. 1346(a)(2), provides, subject to certain exceptions not relevant here:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of * * * [a]ny * * * civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The general Tucker Act, 28 U.S.C. 1491(a)(1), provides in relevant part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Pertinent provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, are reproduced in an appendix to this brief. App., *infra*, 1a-25a.

STATEMENT

1. Respondent is an attorney who, according to the allegations in his complaint, filed a lawsuit on behalf of one of his clients in the United States District Court for the Northern District of Illinois in August 2008. Pet. App. 86a. He paid the $350 filing fee using his own American Express credit card. *Ibid.* The transaction was processed through the federal government's pay.gov system, which dozens of federal agencies use to process online credit-card and debit-card payment transactions. *Id.* at 85a-86a. Respondent alleges that he received from that system a "confirmation webpage that was displayed on his computer screen," as well as an e-mail confirmation, both of which contained the expiration date of his credit card. *Id.* at 87a.

Respondent then filed this putative class action, also in the United States District Court for the Northern District of Illinois, alleging that the government's electronic transaction confirmations did not comply with the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* Pet. App. 2a. FCRA is a consumer-protection statute that regulates, *inter alia*, the collection, dissemination, and use of information related to a consumer's finances and creditworthiness. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001). One of FCRA's substantive provisions generally prohibits a "person" who "accepts credit cards or debit cards for the transaction of business" from "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. 1681c(g)(1). Respondent claimed that the government had violated that provision; that it had done so "willfully"; and that, as a result, he

and a class of thousands of similarly situated persons were entitled to recovery under one of FCRA's general civil-remedies provisions, 15 U.S.C. 1681n. Pet. App. 91a-97a. Section 1681n provides, as relevant here, that "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" either for "any actual damages" or else for statutory damages between $100 and $1000, plus potential punitive damages, as well as reasonable attorney fees and costs. 15 U.S.C. 1681n(a).

The district court dismissed the suit. Pet. App. 23a-30a. The court explained that "[t]he well-established doctrine of sovereign immunity protects the United States from suit except where Congress has 'unequivocally expressed' a waiver of immunity." *Id.* at 27a-28a (quoting *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992)). Respondent pointed to FCRA's general definition of "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity," 15 U.S.C. 1681a(b), and argued that Section 1681n's imposition of damages liability on "[a]ny person" necessarily included the United States. Pet. App. 28a. But the district court rejected respondent's contention that inclusion of the "generic term 'government'" in the definition effectively waives the United States' sovereign immunity, observing that "other federal statutes have unequivocally waived the United States' sovereign immunity by expressly inserting the specific term 'United States' into the statutory language." *Ibid.*; see *id.* at 28a-29a (citing the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1), and the Quiet Title

Act, 28 U.S.C. 2409a(a)). The district court further observed that "a separate section of the FCRA expressly provides that the United States may be liable for certain violations." *Id.* at 29a (citing 15 U.S.C. 1681u(i), which imposes liability on "[a]ny agency or department of the United States" for certain actions relating to law-enforcement investigations). The district court concluded that Section 1681n, in contrast, "has not so unequivocally waived the sovereign immunity of the United States." *Id.* at 29a.

2. Respondent appealed to the Federal Circuit. Pet. App. 19a. His asserted justification for appealing to the Federal Circuit, rather than the regional Seventh Circuit, was 28 U.S.C. 1295(a)(2). Pet. App. 19a-20a. That provision grants the Federal Circuit exclusive jurisdiction "of an appeal from a final decision of a district court of the United States * * * if the jurisdiction of that court was based, in whole or in part, on" the Little Tucker Act, 28 U.S.C. 1346(a)(2).

In the district court, respondent's complaint had alleged multiple bases of jurisdiction over his suit. Pet. App. 82a. One was FCRA's own jurisdictional provision, 15 U.S.C. 1681p, which provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction." Another asserted basis of jurisdiction was the Little Tucker Act, which provides that, subject to certain exceptions, "district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims," of a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Con-

stitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1346(a)(2). The Little Tucker Act is an adjunct to the general Tucker Act, 28 U.S.C. 1491(a)(1), which provides that the same set of claims may be brought in the United States Court of Federal Claims, whether or not the plaintiff seeks more than $10,000. See, *e.g.*, *United States* v. *Sherwood*, 312 U.S. 584, 591 (1941) (substantive scope of Little Tucker Act and Tucker Act are identical). The district court had not resolved the question whether the Little Tucker Act can provide the basis for jurisdiction over a FCRA suit. Pet. App. 26a n.1; see *id.* at 2a.

The government moved to transfer respondent's appeal to the Seventh Circuit. Pet. App. 19a. The government argued that, to the extent a FCRA suit against the United States would be permissible at all, the proper jurisdictional basis would be FCRA's own specific jurisdictional provision, 15 U.S.C. 1681p, and not the more general jurisdictional provision in the Little Tucker Act. Pet. App. 20a-21a. The relevant statute governing an appeal therefore would not be 28 U.S.C. 1295(a)(2), but instead 28 U.S.C. 1291, which would assign the appeal to the appropriate regional circuit (in this case, the Seventh Circuit), rather than the Federal Circuit. Pet. App. 21a. The Federal Circuit, finding the issue "close," denied the government's motion to transfer. *Id.* at 18a-22a.

3. A merits panel of the Federal Circuit subsequently vacated the district court's decision and reinstated respondent's FCRA claim. Pet. App. 1a-17a. Un-

like the district court, the Federal Circuit declined to decide whether FCRA itself expressly and unequivocally waives the United States' sovereign immunity to suit under FCRA's general civil-remedies provisions. *Id.* at 14a. The court instead applied a "less stringent" standard. *Ibid.*

The court of appeals believed that even if FCRA did not itself expressly waive the United States' sovereign immunity, the Little Tucker Act and the general Tucker Act could independently supply such a waiver. Pet. App. 7a. The panel noted that the Little Tucker Act and Tucker Act not only supply district-court or claims-court jurisdiction over certain categories of claims, but also waive the United States' sovereign immunity with respect to those categories of claims. *Id.* at 6a-7a. The panel concluded from that premise that the sovereign-immunity issue in this case could be resolved simply by reexamining the question that had been tentatively addressed by the motions panel as a threshold jurisdictional matter—namely, whether FCRA suits fall within the type of claims covered by the Tucker Act. *Ibid.*

In the panel's view, the applicable mode of analysis for this case could be extrapolated from *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003), a case in which this Court had analyzed whether an Indian tribe had a cause of action based on a statute governing the use of property held in trust for the tribe. The right question to ask in this case, the Federal Circuit panel believed, was whether, treating the Little Tucker Act as the requisite waiver of sovereign immunity, FCRA "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Pet. App. 7a (quoting *White Mountain Apache Tribe*,

537 U.S. at 472). The panel emphasized that this test "demands a showing 'demonstrably lower' than the initial waiver of sovereign immunity." *Ibid.* (quoting *White Mountain Apache Tribe*, 537 U.S. at 472). "It is enough," the panel stated, "that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' . . . a fair inference will do." *Ibid.* (quoting *White Mountain Apache Tribe*, 537 U.S. at 473).

The government objected to that mode of analysis, contending that it would be improper to rely on the Little Tucker Act to sidestep the requirement that FCRA itself unequivocally waive sovereign immunity. Gov't C.A. Br. 23-35. The government did not dispute the basic premise that, with respect to certain kinds of damages claims, the Tucker Act both grants jurisdiction and waives sovereign immunity. But the government argued that FCRA was not the kind of statute to which the Tucker Act could apply. The government also pointed to a number of specific inconsistencies between FCRA and the Tucker Act. Pet. App. 10a-16a.

The Federal Circuit rejected the government's arguments and concluded that the Tucker Act and Little Tucker Act waive the United States' sovereign immunity with respect to suits under FCRA's general civil-remedies provisions. Pet. App. 6a-16a. The court focused on the government's acknowledgment at oral argument that FCRA's general definition of "person" in 15 U.S.C. 1681a(b), which includes "any * * * government," includes the United States for some purposes. Pet. App. 10a-11a; see Oral Argument Recording, No. 2009-1546, at 14:18-16:15, 18:40-19:07 (Fed. Cir. Aug. 2, 2010). The

court reasoned that if "person" includes the United States in some FCRA provisions, "a fair interpretation * * * applies the same definition throughout," including in the civil-remedies provisions. Pet. App. 11a. The court recognized, however, that this reasoning would not necessarily be sufficient to demonstrate that FCRA itself contained an express sovereign-immunity waiver. *Id.* at 14a.

SUMMARY OF ARGUMENT

The Federal Circuit's decision in this case circumvents the "critical requirement," "firmly grounded in [this Court's] precedents," that a "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Lane* v. *Peña*, 518 U.S. 187, 192 (1996). According to the Federal Circuit, the United States is subject to damages actions under FCRA's general civil-remedies provisions, notwithstanding any ambiguity about whether the United States is a proper defendant under those provisions. Any such ambiguity is irrelevant, the Federal Circuit reasoned, because the Tucker Act and Little Tucker Act independently supply the requisite sovereign-immunity waiver and obviate the need to be certain that Congress specifically wanted to expose the public fisc to potentially massive FCRA liability. That reasoning is flawed on multiple levels. The Federal Circuit erred in considering this to be a Little Tucker Act suit over which it could exercise appellate jurisdiction, and the case should be transferred to the Seventh Circuit for application of the proper legal standards.

A. The Tucker Act and Little Tucker Act have no role to play in assessing whether the United States is

liable for damages under FCRA's general civil-remedies provisions. Congress enacted the Tucker Acts in order to avoid the necessity of passing private bills to provide compensation for breaches by the United States of certain types of legal obligations. The Tucker Acts accomplish that goal by supplying a fully formed remedial scheme, including a waiver of sovereign immunity, that permits damages suits against the United States, primarily in the Court of Federal Claims, in certain circumstances. See 28 U.S.C. 1346(a)(2), 1491(a)(1); *United States* v. *Mitchell*, 463 U.S. 206, 212-219 (1983). In particular, the Tucker Acts provide a mechanism for seeking relief in cases where the federal government has violated a duty imposed on the United States by statute; the statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained," *id.* at 217 (citation omitted); and Congress has not otherwise provided a judicial damages remedy. But the Tucker Acts' generalized remedial scheme neither supersedes, nor provides a distorting lens through which to view, the native remedial scheme of a more specialized statute like FCRA.

Throughout the history of the Tucker Act (and its statutory precursors), this Court has repeatedly adhered to "the well-established principle that, in most contexts, a precisely drawn, detailed statute pre-empts more general remedies." *Hinck* v. *United States*, 550 U.S. 501, 506 (2007) (citation omitted); see also, *e.g.*, *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122 (1868). The Court has accordingly declined on numerous occasions to apply the Tucker Act's remedial scheme in circumstances where Congress has more directly addressed the judicial remedies appropriate under a par-

ticular statute. The Court has in particular refused to permit a plaintiff to sidestep a limitation inherent in a statute's own remedial scheme by resorting to the Tucker Act. See, *e.g.*, *Hinck*, 550 U.S. at 507-508.

Yet that is precisely what the Federal Circuit permitted here. In the Federal Circuit's view, even if Congress, when it specifically addressed the question of FCRA remedies, did not elect to allow damages suits against the United States, the Tucker Acts allow a plaintiff to overcome that limitation. The specific-governs-the-general principle forecloses that line of reasoning. The existence of a more generalized remedial scheme under the Tucker Acts says nothing about whether the separate and more specific FCRA remedial scheme can be brought to bear against the United States.

The Federal Circuit purported to draw support for its application of the Tucker Acts from cases where this Court has found congressional intent to provide a monetary remedy for the government's violation of a statute of the sort covered by the Tucker Acts. But those cases involved statutes that expressly applied to the United States and did not contain their own judicial remedial schemes, and the issue was whether there should be any judicial remedy at all for a violation. In those circumstances, it may make sense to analyze whether Congress intended the Tucker Acts' autonomous remedial scheme to apply. That mode of analysis does not make sense, however, when the issue is whether Congress intended to allow claims against the United States under FCRA's remedial scheme. Resolution of that issue depends on whether FCRA itself waives the United States' sovereign immunity—a question answered by the traditional "unequivocal expression" test, not by the Tucker Acts.

B. Even assuming the Tucker Acts' general remedial scheme might be hybridized with a more particular one in some circumstances, no such synthesis would be possible here. FCRA's remedial scheme is irreconcilable with the Tucker Acts in several critical respects.

First, FCRA's general civil-remedies provisions define tort claims—specifically, claims for "willful[]" (15 U.S.C. 1681n) or "negligent" (15 U.S.C. 1681*o*) violations of the statutory duties that FCRA's substantive provisions impose. The Tucker Acts, however, do not permit damages actions against the United States in "cases * * * sounding in tort." 28 U.S.C. 1346(a)(2), 1491(a)(1). The Federal Circuit attempted to avoid that limitation on the scope of the Tucker Acts by distinguishing between "torts" and statutory claims. But a cause of action defined by a statute can qualify as a "tort" within the meaning of the Tucker Acts, see *Schillinger* v. *United States*, 155 U.S. 163, 167 (1894), and the tort liability imposed by Sections 1681n and 1681*o* thus falls squarely within the Tucker Acts' "sounding in tort" exception.

Second, FCRA and the Tucker Acts are at odds about when a district court may exercise jurisdiction over a claim. FCRA provides that suits under its general civil-remedies provisions may be brought in "district court, without regard to the amount in controversy, or in any other court of competent jurisdiction." 15 U.S.C. 1681p. The Tucker Acts, however, require that claims against the United States exceeding $10,000 be brought only in the Court of Federal Claims. 28 U.S.C. 1346(a)(2), 1491(a)(1). Contrary to the Federal Circuit's belief, those provisions cannot be reconciled simply by deeming the Court of Federal Claims to be an "other

court of competent jurisdiction" for FCRA purposes. Not only is that a question-begging interpretation of the phrase "other court of competent jurisdiction" (which more naturally refers only to state courts), but it fails to resolve the inconsistency. A FCRA claim exceeding $10,000 may be filed in district court; a Tucker Act claim exceeding $10,000 may not; and a hybrid Tucker Act/FCRA claim of the sort envisioned by the Federal Circuit would have to disregard one of those two jurisdictional rules.

Third, the two remedial schemes authorize different types of remedies and provide different limitations periods. FCRA authorizes punitive damages for willful violations, 15 U.S.C. 1681n(a)(2); but the Tucker Acts do not permit punitive damages, Pet. App. 14a. And FCRA provides for a two-year or five-year statute of limitations, 15 U.S.C. 1681p(1)-(2); but the statute of limitations for Tucker Act claims is six years, 28 U.S.C. 2401(a), 2501. The Federal Circuit believed that it could overcome these inconsistences as well, simply by adopting the stricter rule in each case. But that reasoning skips past the main point: namely, that the existence of all of these inconsistencies provides powerful evidence that Congress never intended these different remedial schemes to intermingle.

C. Finally, even setting aside the threshold inapplicability of the Tucker Acts, and the conflicts between the different remedial schemes, the Federal Circuit's decision fails on its own terms, because FCRA cannot "fairly be interpreted as mandating compensation by the Federal Government." Pet. App. 7a (citation omitted). The Federal Circuit believed that test to be satisfied by FCRA's imposition of civil liability on "person[s],"

15 U.S.C. 1681n and 1681o, and its separate statutory definition of "person" to include "any * * * government," 15 U.S.C. 1681a(b). FCRA's general definition of "person," however, does not apply uniformly to every FCRA provision. It would be implausible, for example, to conclude that the United States is a "person" subject to criminal liability under FCRA (15 U.S.C. 1681q), or a "person" subject to enforcement suits by federal agencies or States (15 U.S.C. 1681s).

It is similarly implausible to conclude that the United States is a "person" subject to private civil actions under FCRA. For one thing, under the Federal Circuit's logic, not only the United States, but also States, could fairly be considered "person[s]" for purposes of FCRA liability. But the relevant liability-creating language was added to FCRA mere months after this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), had made clear that Congress could not exercise its Commerce Clause powers to abrogate state sovereign immunity. Congress is exceedingly unlikely to have flouted *Seminole Tribe* by trying to subject the States to FCRA suits, and it is difficult to conceive of a reasonable definition of "person" in FCRA's general civil-remedies provisions that would exclude States but include the United States.

Furthermore, Congress's use of the term "person" in FCRA's general civil-remedies provisions contrasts sharply with the language of 15 U.S.C. 1681u(i), which unambiguously permits suit against "[a]ny agency or department of the United States" for certain limited types of FCRA violations (not at issue here). No sound reasoning supports the conclusion that, mere months after enacting Section 1681u(i)'s limited express waiver,

Congress decided to expose the United States to much more expansive liability by using the ambiguous term "person." The legislative history of the 1996 amendments contains no evidence that Congress anticipated that use of the term "person" would have any impact on the federal Treasury, let alone the enormous impact that the Federal Circuit's decision invites. The federal government regularly engages in many of the activities that FCRA regulates, and the imposition of FCRA liability could make it one of the biggest FCRA defendants.

Exposing the United States to liability as a "person" under FCRA would also have substantially unraveled the legislative compromise embodied in the Privacy Act of 1974, 5 U.S.C. 552a. FCRA regulates certain activities of "person[s]" that, when carried out by the United States, are already covered by the Privacy Act. The Privacy Act, however, provides only a narrow set of civil remedies against the United States, 5 U.S.C. 552a(g), the scope of which was a subject of extensive legislative debate and compromise. Congress would not have discarded that compromise, in favor of far broader liability under FCRA and the Tucker Acts, without any debate at all. The Tucker Acts provide no license for imposing burdens on the federal fisc that Congress neither intended nor contemplated, and the Federal Circuit erred in applying them in that fashion.

ARGUMENT

THE TUCKER ACT AND LITTLE TUCKER ACT DO NOT AUTHORIZE SUITS AGAINST THE UNITED STATES UNDER FCRA'S GENERAL CIVIL-REMEDIES PROVISIONS

Congress addressed the issue of private damages remedies for FCRA violations in the text of FCRA itself. The critical question, in determining whether the United States can be sued under FCRA's civil-remedies provisions, is whether Congress specifically intended that result. Recognizing that courts should not readily infer that Congress has opened the door to claims against the federal Treasury, this Court "insist[s] upon" an "unequivocal expression of elimination of sovereign immunity" before concluding that Congress has exposed the United States to suit under a particular remedial scheme. *Lane* v. *Peña*, 518 U.S. 187, 192 (1996) (citation omitted); see also *FAA* v. *Cooper*, No. 10-1024 (Mar. 28, 2012), slip op. 5-6.

The court of appeals here, however, explicitly declined to conclude that FCRA's general civil-remedies provisions, 15 U.S.C. 1681n and 1681*o*, unequivocally express an intent to impose liability on the United States. Pet. App. 14a. It instead believed that it could recognize governmental liability under those provisions notwithstanding uncertainty about whether Congress actually had the United States in mind when it enacted them. *Ibid.* In the court's view, the Tucker Act, 28 U.S.C. 1491(a)(1), and the Little Tucker Act, 28 U.S.C. 1346(a)(2), supply an alternative, and "less stringent," mechanism for applying FCRA's civil-remedies provisions to the United States. Pet. App. 14a. So long as "a fair interpretation" of those provisions could include the

United States as a defendant, the Federal Circuit would allow the Tucker Acts to substitute for an unequivocal textual indication that Congress specifically intended that interpretation. *Ibid.*

That reasoning fundamentally misunderstands the Tucker Acts. The Tucker Acts provide an autonomous remedial scheme that allows plaintiffs to obtain monetary payments based on statutes that impose certain types of obligations on the United States but do not themselves address questions of judicial remedy. The Tucker Acts do not lower the bar for determining whether the United States is a proper defendant under a statute's own organic remedial scheme. Deploying them in that way is particularly unwarranted here, where the Tucker Acts' remedial scheme conflicts with FCRA's in several critical respects, and where the context undermines any suggestion that Congress intended to expose the United States to vast potential liability based on alleged FCRA violations.

A. The Tucker Acts Do Not Create Liability Under Statutes That Contain Their Own Specialized Judicial Remedial Schemes

The Tucker Acts provide a remedial scheme whereby plaintiffs may obtain satisfaction of financial obligations of the United States that might otherwise be unrecoverable. Congress did not intend them to be, and this Court has not applied them as, a basis for determining whether the United States is subject to liability under a specialized remedial scheme such as FCRA's.

1. Originally enacted in 1887, the Tucker Act evolved from congressional efforts to provide a judicial damages remedy against the United States in certain

circumstances in which Congress otherwise would have needed to pass a specialized bill to give redress to an aggrieved person. Before 1855, claims against the federal government required a direct petition to Congress. *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983) (*Mitchell II*). In 1855, "primarily to relieve the pressure on Congress caused by the volume of private bills," Congress created the Court of Claims. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 552 (1962) (opinion of Harlan, J.); see *Mitchell II*, 463 U.S. at 212-213. The Court of Claims was authorized to hear "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." Act of Feb. 24, 1855 (1855 Act), ch. 122, §1, 10 Stat. 612.

Congress did not initially authorize the Court of Claims "[t]o render judgments and draw warrants upon the Treasury." Cong. Globe, 33d Cong., 2d Sess. 107 (1854) (statement of Sen. Brown). Instead, case-specific legislation was necessary to pay claims that the court had approved. See 1855 Act § 7, 10 Stat. 613. For that reason, the creation of the Court of Claims did not fully "relieve Congress from the laborious necessity of examining the merits of private bills." *Mitchell II*, 463 U.S. at 213 (internal quotation marks and citation omitted). In 1863, on the recommendation of President Lincoln, Congress gave the Court of Claims authority to enter final judgments. See Act of Mar. 3, 1863, § 3, ch. 92, 12 Stat. 765.

In 1887, Congress enacted the Tucker Act (named after its primary sponsor, Representative John Randolph Tucker). *Mitchell II*, 463 U.S. at 213-214. Its primary purpose was to expand the Court of Claims' juris-

diction beyond damages claims based on statutes, regulations, and contracts to include certain other categories, such as certain constitutional damages claims. H.R. Rep. No. 1077, 49th Cong., 1st Sess. 3-4 (1886) (House Report); see Act of Mar. 3, 1887 (Tucker Act), ch. 359, 24 Stat. 505. The Tucker Act thus provided that the Court of Claims would have jurisdiction over suits against the United States "founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort." Tucker Act § 1, 24 Stat. 505. In a section known as the "Little Tucker Act," the Tucker Act provided that "[j]urisdiction concurrent with the Court of Claims" would lie in the district courts for claims seeking up to $1000 and in the circuits for claims between $1000 and $10,000. House Report 4; see Tucker Act § 2, 24 Stat. 505; see also *Mitchell II*, 463 U.S. at 212 n.10. This Court has held that "by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims." *Mitchell II*, 463 U.S. at 212 (footnote omitted).

As relevant to this case, the current versions of the Tucker Act and Little Tucker Act are largely identical to the 1887 versions. Compare 28 U.S.C. 1491(a)(1) (allowing suits "founded * * * upon" an "Act of Congress"), with Tucker Act § 1, 24 Stat. 505 (allowing suits "founded upon" a "law of Congress, except for pensions"). There are only four pertinent changes. First, original jurisdiction under the Tucker Act is now vested

in the Court of Federal Claims, the successor to the trial-court functions of the former Court of Claims. 28 U.S.C. 1491(a)(1); see *Hercules, Inc.* v. *United States*, 516 U.S. 417, 423 n.5 (1996). Second, the Little Tucker Act now grants concurrent jurisdiction for claims not exceeding $10,000 only to the district courts (rather than the district and circuit courts). 28 U.S.C. 1346(a)(2). Third, Congress has enacted an "Indian Tucker Act," which is worded and operates similarly to the Tucker Act, but applies to claims of Indian tribes. 28 U.S.C. 1505; see, *e.g.*, *Mitchell II*, 463 U.S. at 214. Finally, the Federal Circuit has inherited the appellate functions once performed by the Court of Claims, including its appellate jurisdiction over Tucker Act suits, and has exclusive jurisdiction over appeals in Little Tucker Act and Indian Tucker Act cases as well. 28 U.S.C. 1295(a)(2)-(3); *Lindahl* v. *OPM*, 470 U.S. 768, 775 (1985).

2. This Court's application of the Tucker Act and Little Tucker Act has reflected the Tucker Acts' purpose to provide a judicial remedy in cases in which the alternative congressional remedy for unlawful executive action would have been a private bill. Although the text of the Tucker Act literally encompasses, *inter alia*, "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department," 28 U.S.C. 1491(a)(1), the Court has recognized that "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act." *Mitchell II*, 463 U.S. at 216. Congress would not, for example, have intended a Tucker Act remedy for statutes as to which another more specialized statutory judicial remedy already existed. And the Court has repeatedly held that such stat-

utes are not separately enforceable in a suit for monetary compensation under the Tucker Act (or its predecessors).

In *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122 (1868), for example, the Court held that the Tucker Act's immediate predecessor did not permit suit to recover an illegally assessed import duty. The Court rejected the plaintiff's contention that his suit necessarily fell within the Court of Claims' jurisdiction over "claims founded upon any law of Congress," simply because the suit was "founded on one of the tariff acts of Congress." *Id.* at 128-129. The Court observed that another statute already provided a mechanism whereby an importing merchant could pay a duty under protest, sue the collector to recover, and be repaid from Treasury funds if successful. *Id.* at 126. "Can it be supposed," the Court asked, "that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, intended to give to the * * * importer a further and different remedy?" *Id.* at 131. The Court answered that question in the negative. "The mischiefs that would result, if the aggrieved party could disregard the provisions in the system designed expressly for his security and benefit, and sue at any time in the Court of Claims, forbid the idea that Congress intended to allow any other modes to redress a supposed wrong in the operation of the revenue laws, than such as are particularly given by those laws." *Ibid.*

The Court's more recent cases have applied that same specific-governs-the-general principle. For instance, in *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), the Court held that a plaintiff could not bring an action under the Little Tucker Act alleging

employment discrimination by a federal agency. *Id.* at 834; see Pet. Br. 26-31, *Brown*, *supra* (No. 74-768) (contending that the Little Tucker Act applied). The Court relied in part on legislative history indicating congressional intent that Title VII supply the only remedy, but also stressed the "balance, completeness, and structural integrity" of the Title VII remedy, and the principle that "a precisely drawn, detailed statute pre-empts more general remedies." 425 U.S. at 828-834.

That principle applies whether or not the existing remedial scheme actually provides recovery for the type of claim the plaintiff asserts. In *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982), for example, the Court declined to recognize a Tucker Act remedy for a dispute about reimbursement under the Medicare Act. *Id.* at 208. The Court observed that the judicial review provisions in the Medicare Act itself did not authorize the sort of judicial action the plaintiff had tried to bring under the Tucker Act, and reasoned that "[i]n the context of the statute's precisely drawn provisions, this omission provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims." *Ibid.* Similarly, in *United States* v. *Fausto*, 484 U.S. 439 (1988), the Court held that, because the "comprehensive and integrated" review provisions of the Civil Service Reform Act did not provide for judicial review of the plaintiff's suspension from federal employment, the plaintiff could not seek compensation for that suspension through a Back Pay Act suit against the United States under the Tucker Act. *Id.* at 454.

Most recently, in *Hinck* v. *United States*, 550 U.S. 501 (2007), the Court held that a suit to abate interest on federal taxes could be brought only in the Tax Court

under a special provision of the Internal Revenue Code, and not under the Tucker Act. *Id.* at 506-507; see Pet. Br. 16-21, *Hinck*, *supra* (No. 06-376) (contending that Tucker Act applied). The Court observed that the tax statute already "provide[d] a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief." 500 U.S. at 506. The Court reasoned that the "precisely drawn, detailed" tax statute precluded resort to a separate Tucker Act remedy. *Ibid.* (quoting *EC Term of Years Trust* v. *United States*, 550 U.S. 429, 433 (2007)).

3. The specific-governs-the-general principle applied in the cases discussed above dictates the outcome of this case. As in those cases, FCRA contains a "precisely drawn, detailed" remedial scheme that leaves no room for the Tucker Act's separate, and more general, remedial scheme.

FCRA is a consumer-protection statute intended to "ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 52 (2007). As a remedial mechanism, FCRA permits an injured "consumer" to bring suit against a "person" who "willfully" (15 U.S.C. 1681n) or "negligent[ly]" (15 U.S.C. 1681*o*) fails to comply with "any requirement imposed under this subchapter." See also, *e.g.*, 15 U.S.C. 1681m(h)(8)(A), 1681s-2(c) (specially excepting certain requirements from enforcement under Sections 1681n and 1681*o*). Such suits may be brought in "any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction," within five years of the violation,

or two years of its discovery (whichever is earlier). 15 U.S.C. 1681p.

FCRA, like the tax statute at issue in *Hinck*, "provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief." 550 U.S. at 506. FCRA's jurisdictional provision, 15 U.S.C. 1681p, specifies both a forum for adjudication ("any appropriate United States district court, without regard to the amount in controversy" or "any other court of competent jurisdiction") and a statute of limitations (the earlier of five years after the violation or two years after its discovery by the plaintiff). The general civil-remedies provisions, 15 U.S.C. 1681n and 1681*o*, identify a class of potential plaintiffs ("consumer[s]"), a standard of review (the state of mind, namely, willfulness or negligence, necessary for liability to attach), and authorization for judicial relief (actual, statutory, and/or punitive damages, plus fees and costs). As with the tax statute at issue in *Hinck*, FCRA's specific, self-contained scheme necessarily "pre-empts more general remedies" like the Tucker Act and Little Tucker Act. 550 U.S. at 506 (citation omitted).

Because FCRA's more specific remedy supersedes the Tucker Acts, the Federal Circuit erred in believing that the Little Tucker Act could "provide[] the waiver of sovereign immunity that the trial court found lacking in the FCRA itself." Pet. App. 7a. As the cases discussed above (pp. 20-23, *supra*) demonstrate, the Tucker Act cannot be used to circumvent the constraints of an existing remedial scheme. In each of those cases, the Tucker Acts would have allowed plaintiffs to avoid some limitation in the self-contained remedial scheme. See *Hinck*,

550 U.S. at 509-510 (specific remedial statute restricted class of plaintiffs eligible to seek relief); *Fausto*, 484 U.S. at 449 (same); *Erika, Inc.*, 456 U.S. at 207-208 (specific remedial statute allowed for judicial review only in certain circumstances); *Brown*, 425 U.S. at 824 (specific remedial statute required suit within 30 days of final agency action); *Nichols*, 74 U.S. (7 Wall.) at 126 (specific remedial statute required payment of duty under protest). In each case, the Court refused to permit that result.

In *Hinck*, for example, the petitioners argued that they could rely on the substance of the specific tax statute at issue (which allowed for abuse-of-discretion review of certain agency decisions) while importing the Tucker Act for other remedial purposes. 550 U.S. at 507-508. The Court rejected that argument, explaining that "[w]e cannot accept the Hincks' invitation to isolate one feature of this 'precisely drawn, detailed statute'—the portion specifying a standard of review—and use it to permit taxpayers to circumvent the other limiting features Congress placed in the *same* statute." *Id.* at 507.

The Federal Circuit in this case engaged in the same sort of mixing and matching that the Court rejected in *Hinck*. It relied on the substance of 15 U.S.C. 1681n, which allows damages claims for willful violations of FCRA, while invoking the Tucker Act to remove any sovereign-immunity limitation on that provision's scope as applied to the United States. Pet. App. 10a-11a, 14a. The Tucker Act cannot be employed to create such hybrid suits and remedies.

4. The Federal Circuit purported to find support for its methodology in the so-called "money-mandating"

(Pet. App. 7a) test that this Court has sometimes applied to determine whether a particular federal statute creates a substantive right that would provide the basis for a Tucker Act suit. That test examines whether the statute in question "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Ibid.* (quoting *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003)). As *Hinck* exemplifies, however, the fair-interpretation test takes a back seat to the specific-governs-the-general principle. Although the plaintiffs in *Hinck* argued that the tax statute at issue there was "money mandating," Pet. Br. 18-19, *Hinck*, *supra* (No. 06-376), this Court resolved the case based on the specific-governs-the-general principle and did not analyze it under a "money-mandating" framework. 550 U.S. at 506-510. Compare also Resp. Br. 13-14, 19-22, *Erika, Inc.*, *supra* (No. 80-1594) (arguing for the application of that framework), with *Erika, Inc.*, 456 U.S. at 206-211 (resolving the case on the ground that the specific governs the general).

This Court has never applied that fair-interpretation framework to hold that a plaintiff may sue the United States under damages provisions contained in a statute of general applicability. Rather, circumstances in which this Court has applied that framework have involved statutes that unquestionably applied to the United States. In those cases, the plaintiff has contended that the statute (or regulation) creates a right to compensation and has invoked the Tucker Act (or Indian Tucker Act) as the mechanism for obtaining the desired monetary remedy. The Court has sometimes agreed that the Tucker Act supplied such a remedy and sometimes has not. See *United States* v. *Navajo Nation*, 556 U.S. 287,

290, 295 (2009) (no Indian Tucker Act claim under 25 U.S.C. 635(a), 638 and 30 U.S.C. 1300(e)); *United States* v. *Navajo Nation*, 537 U.S. 488, 493 (2003) (no Indian Tucker Act claim under Indian Mineral Leasing Act of 1938); *White Mountain Apache Tribe*, 537 U.S. at 468 (Indian Tucker Act claim based on unique statute providing for particular Indian property to be held in trust by United States); *Bowen* v. *Massachusetts*, 487 U.S. 879, 905 n.42 (1988) (no Tucker Act claim based on provision of Medicaid Act, 42 U.S.C. 1396b(a)); *Mitchell II*, 463 U.S. at 226 (Tucker Act claim based on certain governmental statutes and regulations concerning Indian lands); *Army & Air Force Exch.* v. *Sheehan*, 456 U.S. 728, 738-739 (1982) (no Tucker Act claim based on military-exchange employment regulations); *United States* v. *Mitchell*, 445 U.S. 535, 546 (1980) (no Tucker Act claim based on Indian General Allotment Act); *United States* v. *Testan*, 424 U.S. 392, 401-402 (1976) (no Tucker Act claim based on Classification Act). In cases in which an alternative remedial scheme was already potentially available, the Court has cited that as a reason not to allow a Tucker Act remedy. See *Sheehan*, 456 U.S. at 740-741; *Testan*, 424 U.S. at 403-404.

The case on which the Federal Circuit primarily relied—*United States* v. *White Mountain Apache Tribe*—illustrates the circumstances in which the fair-interpretation test would supply the appropriate mode of analysis. *White Mountain Apache Tribe* did not involve, as this case does, a statute of general applicability that contains its own remedial scheme. Instead, the statute in that case, which stated that the United States would hold certain land in trust for an Indian tribe, unambiguously applied only to the United States and said

nothing about remedies. 537 U.S. at 468-469. The issue in *White Mountain Apache Tribe* was whether the remedial scheme of the Indian Tucker Act provided damages if the government failed to carry out the duties imposed by the statute. *Id.* at 474-478. In other words, the question was whether any remedial scheme for damages at all should apply to the statute. It was to answer that question that the Court analyzed whether the particular Indian statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 472 (citation omitted).

In applying that same test to this case, the Federal Circuit picked the wrong tool for the job. The question here is not whether FCRA calls for a remedial scheme—it already has one of its own. The question instead is whether FCRA's generally applicable remedial scheme permits suits against the United States. The test drawn from *White Mountain Apache Tribe*—whether a statute that applies only to the United States can fairly be interpreted to contemplate the payment of compensation in the event of a violation—does not help to answer that question.

5. Instead, as this Court's sovereign-immunity precedents demonstrate, the question whether the United States is subject to suit under the remedial scheme of a generally applicable statute is answered by examining whether Congress has unequivocally expressed its specific intent that the particular remedial scheme it created should apply to the United States. In *Lane* v. *Peña*, for example, a plaintiff sought to sue the federal government for a violation of Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a). This Court analyzed the Rehabilitation Act, found no unambiguous

waiver of federal sovereign immunity in the statute's text, and consequently affirmed the dismissal of the suit. 518 U.S. at 190-200. Similarly, in *United States Department of Energy* v. *Ohio*, 503 U.S. 607 (1992), a State sought to impose punitive fines on the United States for violations of the Clean Water Act. The Court found no "clear and unequivocal waiver" of the United States' sovereign immunity from such fines and therefore "rejected" the State's attempt to impose them. *Id.* at 619-620.

The outcome of these and similar cases should not change simply because a plaintiff, like respondent here, invokes the Little Tucker Act or the Tucker Act as a basis for jurisdiction. Cf. *Brown*, 425 U.S. at 833 ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."). The fair-interpretation test is not, as the Federal Circuit would have it, a "less stringent" (Pet. App. 14a) substitute for the traditional rule that a comprehensive statute must itself clearly and unequivocally waive the United States' sovereign immunity to damages actions. Treating it as such conflicts with the history of the Tucker Acts and with this Court's precedents interpreting those Acts; significantly expands the jurisdiction of the Federal Circuit, and of the Court of Federal Claims and district courts, under the Tucker Acts; and exposes the United States to damages in circumstances never contemplated by Congress. This Court should reject the Federal Circuit's methodology and reaffirm that when Congress specifically addresses the issue of judicial remedies available for the violation of a particular statute, the relevant inquiry is whether Congress specifi-

cally and expressly intended that statute's remedial provisions to waive the sovereign immunity of the United States.

B. The Tucker Acts' Remedial Scheme Irreconcilably Conflicts With FCRA's

Even assuming that the Tucker Acts could, in theory, be grafted onto another statute's existing, self-contained remedial scheme, that operation would be impossible here. The Tucker Acts conflict in a number of critical ways with FCRA.

1. As a threshold matter, FCRA suits fall outside the class of claims covered by the Tucker Acts. The Tucker Acts have never permitted claims against the United States "sounding in tort." 28 U.S.C. 1346(a)(2), 1491(a)(1). As this Court explained over a century ago, that limiting language, "even if qualifying only the clause immediately preceding, and not extending to the entire grant of jurisdiction found in the section, is a clear endorsement of the frequent ruling of this court that cases sounding in tort are not cognizable in the Court of Claims." *Schillinger* v. *United States*, 155 U.S. 163, 169 (1894); see also *Basso* v. *United States*, 239 U.S. 602, 606-608 (1916) (reaffirming *Schillinger*). The Court has adhered to that interpretation, repeatedly describing the Tucker Act and Little Tucker Act as encompassing only non-tort claims. See, *e.g.*, *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723, 1729 (2011) (describing Tucker Act as a "general waiver of sovereign immunity for non-tort claims for monetary relief"); *United States* v. *Hohri*, 482 U.S. 64, 66 n.1 (1987) (describing Little Tucker Act and Tucker Act jurisdiction as "limited to nontort claims"); *Bigby* v. *United States*,

188 U.S. 400, 407 (1903) (observing that government liability for "the torts, misconduct, misfeasances or laches of its officers or employ[ee]s * * * is expressly excluded by" the Tucker Act).

FCRA's general civil-remedies provisions define causes of action sounding in tort, and are therefore not cognizable under the Tucker Acts. The definition of a "tort," both around the time of the Tucker Act's enactment and now, is "a legal wrong committed upon the person or property independent of contract." *Black's Law Dictionary* 1178 (1st ed. 1891); see *Black's Law Dictionary* 1626 (9th ed. 2009) (defining "tort" as "a civil wrong, other than a breach of contract, for which a remedy may be obtained, usu. in the form of damages"). FCRA's general remedial provisions, which provide damages for "willful[]" (15 U.S.C. 1681n) or "negligent" (15 U.S.C. 1681*o*) violations of the rights that FCRA guarantees to consumers, fall squarely within that definition. See *Black's Law Dictionary* 1626-1627 (9th ed. 2009) (listing "negligent tort[s]" and "willful tort[s]" as types of "tort[s]").

This Court has itself referred to tort treatises to help define the term "willfully" in FCRA's civil-remedies provisions. See *Safeco Ins. Co. of Am.*, 551 U.S. at 57, 69. And it has long been understood that "[c]ausing harm by negligence is a tort," including for Tucker Act purposes. *Bigby*, 188 U.S. at 408. FCRA claims are necessarily "independent of contract," as actionable violations of FCRA can occur without a breach of contract—or, indeed, without any contractual privity at all between the plaintiff and the defendant. See, *e.g.*, 15 U.S.C. 1681c(a) (restricting the information that a "consumer reporting agency," which provides reports to a potential lender or

employer rather than the consumer himself, may report about a consumer). In this case, for example, respondent does not (and could not) allege that the FCRA violation he asserts (including too much information on a credit-card receipt, see 15 U.S.C. 1681c(g)(1)) constitutes a breach of contract.

The Federal Circuit sought to avoid the Tucker Act's limitation to non-tort claims, at least with respect to negligence suits under Section 1681*o*, by positing a difference between "a negligence claim" (which, it conceded, would not be covered by the Tucker Act) and "a statutory claim that includes an element which is analyzed under a negligence standard" (which, in its view, would be allowable under the Tucker Act). Pet. App. 15a. Respondent has similarly suggested (Br. in Opp. 15) that the term "tort" should be defined to include only "a common-law cause of action under state law" and not "a federal-law statutory claim."

This Court, however, has drawn no distinction between statutory and nonstatutory torts in the context of the Tucker Act. In *Schillinger* v. *United States*, the Court looked to a statutory cause of action in concluding that a suit alleging the government's unlawful use of a patent fell within the Tucker Act's tort bar. 155 U.S. at 169. The Court deemed it "clear" that the suit was "one sounding in tort," reasoning in part that it was "plainly and solely an action for an infringement, and in this connection reference may be made to the statutory provision (Rev. Stat. § 4919 [1870]) of an action on the case, as the legal remedy for the recovery of damages for the infringement of a patent." *Ibid.*; see also *United States* v. *Berdan Firearms Mfg. Co.*, 156 U.S. 552, 566 (1895) ("[A] mere infringement, which is only a tort, creates no

cause of action in the court of claims."). If, as the Federal Circuit and respondent have suggested, a statutory cause of action cannot be a "tort" for purposes of the Tucker Act's bar, then the existence of the patent-infringement statute would have undercut, rather than supported, the Court's conclusion in *Schillinger* that the claim at issue sounded in tort.

When Congress has exposed the United States to tort liability, it has done so separately from the Tucker Act. For example, it responded to *Schillinger* (and similar cases declining to permit patent-infringement torts under the Tucker Act) by passing a special statute specifically waiving the United States' immunity with respect to patent-infringement claims. *Crozier* v. *Fried. Krupp Aktiengesell-schaft*, 224 U.S. 290, 303-304 (1912). More sweepingly, Congress in 1946 enacted the Federal Tort Claims Act (FTCA), ch. 753, Tit. IV, 60 Stat. 842, which waives the United States' sovereign immunity for claims based on certain torts committed by federal officers and employees. But the FTCA provides for liability only when the United States, if a private person, would be liable under *state* law. 28 U.S.C. 1346(b)(1). Torts based on asserted violations of federal statutes are not covered. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 477-478 (1994). That limitation cannot be circumvented by resort to a cramped and ahistorical interpretation of the Tucker Act's exclusion of cases "sounding in tort."

2. A further obstacle to applying the Tucker Act to FCRA is that FCRA's own jurisdictional provision, 15 U.S.C. 1681p, directs plaintiffs to different courts than the Tucker Act does. Section 1681p specifically provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate

United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction." Under the plain language of the statute, any action under FCRA, regardless of the amount sought, may be brought in district court.

The Tucker Acts, in contrast, only permit claims up to $10,000 to be brought in district court. The general Tucker Act provides that "[t]he United States Court of Federal Claims shall have jurisdiction" over the types of damages claims it covers. 28 U.S.C. 1491(a)(1). The Little Tucker Act allows those same types of claims also to be brought in district court, but only when the plaintiff seeks no more than $10,000. 28 U.S.C. 1346(a)(2). For a claim of more than $10,000, the Court of Federal Claims has exclusive jurisdiction.

The conflicting jurisdictional directives cannot be reconciled. A plaintiff who wants to bring a FCRA claim for more than $10,000 against the United States cannot simultaneously be authorized (by Section 1681p) to bring suit in district court yet be required (by the Tucker Act) to bring suit only in the Court of Federal Claims. Rather, the fundamental divergence between FCRA's jurisdiction provision (which establishes district courts as the primary forum for suit) and the Tucker Act's (which establishes the Court of Federal Claims as the primary forum for suit) demonstrates that FCRA is not the sort of "Act of Congress" as to which Congress could have intended the Tucker Act to apply.

The jurisdictional mismatch between the Tucker Act and FCRA is fatal to respondent's claim, even though his particular claim (and those of the other classmembers he purports to represent) happens to be under $10,000. For two independent reasons, the Little Tuc-

ker Act's grant of "concurrent" jurisdiction to district courts for Tucker Act claims up to $10,000, 28 U.S.C. 1346(a)(2), cannot be interpreted to permit FCRA claims below that threshold. First, the Little Tucker Act's substantive scope is identical to the general Tucker Act's. Compare *ibid.*, with 28 U.S.C. 1491(a)(1). It does not encompass any sorts of claims (such as FCRA claims) that could not be brought under the general Tucker Act. *United States* v. *Sherwood*, 312 U.S. 584, 590-591 (1941). Thus, because the jurisdictional conflict forecloses FCRA suits under the general Tucker Act, it forecloses them under the Little Tucker Act as well. Second, a district court exercising Little Tucker Act jurisdiction is not sitting as a district court in the usual sense. Instead, as this Court has explained, the Little Tucker Act does "no more than authorize the District Court to sit as a court of claims." *Id.* at 591. FCRA, in contrast, anticipates that district courts hearing FCRA suits will be sitting as district courts. See 15 U.S.C. 1681p.

The Federal Circuit believed that the jurisdictional provisions could be harmonized simply by considering the Court of Federal Claims to be a "court of competent jurisdiction" in which Section 1681p would authorize suit. Pet. App. 12a. But that does not solve the problem. Section 1681p provides that a plaintiff can file any FCRA claim in district court "*or* in any *other* court of competent jurisdiction" (emphases added). It therefore presumes that the district court is itself *always* competent to adjudicate a FCRA claim. It does not contemplate that other, unspecified federal courts, such as the Court of Federal Claims, might award damages that are unavailable in district court.

The Federal Circuit's proposal moreover suffers from "some circularity of reasoning." *Fausto*, 484 U.S. at 454. It tries to assume away a conflict between the different jurisdictional provisions simply by presupposing that Congress would have deemed the Court of Federal Claims a "competent" court to resolve FCRA suits. See *ibid.* (noting circularity in Court of Claims' reasoning that it was an "appropriate authority" to entertain suits under the Back Pay Act "because it had jurisdiction to award backpay"). There is no evidence that Congress held such a view. Instead, the more natural interpretation of the reference to "any other court of competent jurisdiction" is that it merely ensures that FCRA claims may be brought in state court as well as federal district court. See *Bank One Chi. N.A.* v. *Midwest Bank & Trust Co.*, 516 U.S. 264, 268 (1996) (describing similarly worded provision as "provid[ing] for concurrent federal-court and state-court jurisdiction"). It is, moreover, highly unlikely that Congress had federal-government-specific claims courts in mind when it first enacted the phrase in the original 1970 version of FCRA, as not even the Federal Circuit has suggested the 1970 version imposed liability on the United States. Fair Credit Reporting Act (1970 Act), Pub. L. No. 91-508, Tit. VI, § 618, 84 Stat. 1134; see Pet. App. 14a; pp. 41-43, *infra*.

Respondent, relying on a vacated Seventh Circuit decision, has suggested a different, but equally incorrect, way to resolve the conflict between Section 1681p and the Tucker Act. See Br. in Opp. 7-8 (citing *Talley* v. *United States Dep't of Agric.*, 595 F.3d 754 (2010), vacated on reh'g en banc, No. 09-2123, 2010 WL 5887796 (7th Cir. Oct. 1, 2010)). The Seventh Circuit panel, un-

like the Federal Circuit here, recognized that under Section 1681p, any FCRA action must be capable of adjudication by a district court. *Talley*, 595 F.3d at 759. It reasoned, however, that Section 1681p's grant of jurisdiction to district courts "without regard to the amount in controversy" would "supersed[e] the [Tucker Act's] allocation of large demands to the Court of Federal Claims," such that "all suits under [FCRA] may be litigated in a district court, while the Tucker Act remains available as a waiver of sovereign immunity." *Ibid.*

That reasoning is flawed. It violates the basic principle that the Tucker Act "is a package deal—the waiver of sovereign immunity is coextensive with the jurisdiction the statute confers." *United States* v. *Park Place Assocs., Ltd.*, 563 F.3d 907, 927 (9th Cir. 2009); see also *Presidential Gardens Assocs.* v. *United States*, 175 F.3d 132, 141 (2d Cir. 1999). As this Court has explained, the Tucker Act is "simply [a] jurisdictional provision[]" (allowing the Court of Federal Claims to hear certain suits) that also "operate[s] to waive sovereign immunity." *United States* v. *Navajo Nation*, 556 U.S. at 290; see *Mitchell II*, 463 U.S. at 212-216. It is not a free-floating waiver that plaintiffs may invoke in cases in which a district court has jurisdiction under some other statute such as Section 1681p. Because FCRA's own jurisdictional grant cannot be squared with the Tucker Act, the Tucker Act's sovereign-immunity waiver cannot be applied to FCRA.

3. FCRA and the Tucker Act conflict in other relevant respects as well. For one thing, a plaintiff suing for a willful violation of FCRA may seek punitive damages. 15 U.S.C. 1681n(a)(2). But, as the Federal Circuit acknowledged, the Tucker Act only allows awards of com-

pensatory damages. Pet. App. 14a (citing *Brown* v. *United States*, 105 F.3d 621, 623 (Fed. Cir. 1997)). The Federal Circuit tried to sidestep this problem by declaring that it would recognize only those FCRA claims that (as is the case with the complaint here) do not seek punitive damages. *Id.* at 15a; see *id.* at 96a. But the difference in the types of remedies available under FCRA and the Tucker Act simply underscores why Congress could not have intended the Tucker Act to be a basis for asserting FCRA damages claims against the United States.

Differences in the two remedial schemes' limitations periods further illustrate the point. FCRA claims are cabined by a distinct statute of limitations, and must be asserted no later than two years after the date of the discovery of the violation that is the basis of liability, or five years after the date on which the violation occurs, whichever is earlier. 15 U.S.C. 1681p(1) and (2). Tucker Act and Little Tucker Act suits, in contrast, are governed by a six-year statute of limitations. See 28 U.S.C. 2401(a), 2501. This Court has viewed differences in limitations periods as an indication that a more specific remedial scheme should govern over the general. See, *e.g.*, *EC Term of Years Trust*, 550 U.S. at 433-434 (rejecting reliance on more general remedial provision that would allow plaintiffs to "effortlessly evade" more specific statute's limitations period); *Brown*, 425 U.S. at 833 (similar).

The Federal Circuit dismissed this concern by noting that "different statutes of limitations are common in federal practice," and stating that "the rule is that the more specific limit prevails, not that a short limit cancels out any substantive statute." Pet. App. 16a (internal

quotation marks and citation omitted). In support of the latter proposition, the Federal Circuit and respondent have cited *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008), and *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941). See Pet. App. 16a; Br. in Opp. 15. Those decisions undermine, rather than support, the Federal Circuit's conclusion.

Both cases involved the application of a particularized five-year statute of limitations for tax-refund actions. *Clintwood Elkhorn Mining Co.*, 553 U.S. at 4; *A.S. Kreider Co.*, 313 U.S. at 447. In each case, the Court applied the specific-governs-the-general principle to hold that the more specific tax-refund limitations period superseded a more general default six-year limitations period for suits against the United States. *Clintwood Elkhorn Mining Co.*, 553 U.S. at 4; *A.S. Kreider Co.*, 313 U.S. at 447. In neither case did the Court directly address whether the Tucker Act can provide the basis for bringing suit against the United States under a statute that not only supplies a statute of limitations, but also all the other elements necessary to create a complete and self-contained remedy. See *Clintwood Elkhorn Mining Co.*, 553 U.S. at 9 (declining to decide whether respondent's suit arose directly under the Tucker Act). But the logic of both decisions indicates that the more specific remedial scheme would supersede a more general remedial scheme altogether. They thus reinforce the long line of cases already discussed (see pp. 20-23, *supra*) that expressly so hold.

That oft-recognized specific-governs-the-general principle precludes a court from superimposing the Tucker Act atop an existing remedial scheme, and it certainly precludes the mixed Tucker Act-FCRA scheme

created by the Federal Circuit in this case. Congress could not have intended a scheme that incorporates the Tucker Act's sovereign-immunity waiver while dispensing with its bar against tort suits and its statute of limitations, and incorporates FCRA's liability provisions while dispensing with its jurisdictional directives and its provision for punitive damages. That judicially created hybrid is at odds with both statutes, is supported by neither, and has no legitimate legal basis.

C. FCRA Does Not Demonstrate Congressional Intent To Expose The United States To Damages Under The Tucker Act

Even assuming away the conflicts between the remedial schemes, and accepting for argument's sake the premise that the Tucker Act might apply, permitting FCRA claims under the Tucker Act would contravene congressional intent. As the Federal Circuit recognized, a Tucker Act suit requires, at a minimum, that the relevant substantive statute can "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Pet. App. 7a (quoting *White Mountain Apache Tribe*, 537 U.S. at 472). And contrary to the Federal Circuit's conclusion, FCRA's general civil-remedies provisions cannot fairly be interpreted as evidencing congressional intent to expose the United States to damages liability.

The Federal Circuit's imposition of such liability was premised entirely on the statutory definition of "person" in 15 U.S.C. 1681a(b) as including "any * * * government or governmental subdivision or agency." Pet. App. 10a-11a. The United States acknowledged in the court of appeals that, even though the Section 1681a(b) defini-

tion does not specifically mention the United States, the term "person" in some FCRA contexts could include the United States. *Ibid.* But Congress's intent to include the United States varied depending on the context of the particular section in which the term was used. See, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 344-345 (1997) (interpretation of defined term can depend on context); see also *Roberts* v. *Sea-Land Servs., Inc.*, No. 10-1399, slip op. 13 (Mar. 20, 2012) ("[T]he presumption that 'identical words used in different parts of the same act are intended to have the same meaning . . . readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.") (quoting *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 (2004)). And the history and structure of FCRA demonstrate that Congress never intended the term "person" to include the United States in the context of civil-remedies provisions subjecting a "person" to damages liability.

1. When Congress first enacted Section 1681a(b)'s definition of "person," in the original 1970 version of FCRA, the definition did not directly impose liability on federal, state, or local governments. 1970 Act § 603, 84 Stat. 1128. As originally enacted, FCRA principally regulated "consumer reporting agencies"—entities that aggregate and disseminate personal information about consumers, which third parties use to determine a consumer's eligibility for credit, insurance, or employment, or for other enumerated purposes. § 603(f), 84 Stat. 1129 (defining "consumer reporting agency"); §§ 604-605, 607-614, 84 Stat. 1129-1133 (imposing substantive requirements on consumer reporting agencies); see 15

U.S.C. 1681a(f) (current statutory definition of "consumer reporting agency"). The only requirements imposed directly upon "person[s]" related to the procurement of investigative consumer reports. 1970 Act § 606, 84 Stat. 1130; see also § 615, 84 Stat. 1133 (suggesting that a "person" might also be subject to additional requirements if he used a consumer report). Consistent with its focus on consumer reporting agencies, the damages provisions of the 1970 Act applied not to "persons" but to consumer reporting agencies and "user[s] of information." §§ 616-617, 84 Stat. 1134. The choice of language in defining the term "person" therefore did not reflect an expectation that FCRA could be the basis for a damages claim against the federal government (or a state or local government).

Nor did Congress intend that the United States always be considered a "person" for every FCRA purpose, irrespective of context. As this Court has recognized, Congress may not want a statutory definition of "person" to apply in the same way across all provisions of a statute. In *United States* v. *Public Utilities Commission*, 345 U.S. 295 (1953), the Court considered the meaning of the phrase "sale of electric energy to any person for resale," as it appeared in Section 201 of the Federal Power Act. *Id.* at 312. The Act specifically defined "person" to include only "an individual or a corporation," *id.* at 312 n.20 (citation omitted), and it expressly excluded "'municipalities'" from the definition of "corporation," *id.* at 312 n.21 (citation omitted). The Court nevertheless concluded that Section 201 covered sales of energy to a municipality, as well as to the United States Navy. *Id.* at 316. The Court reasoned that, notwithstanding the limitations on the Act's defini-

tion of a "person," this broad interpretation was more consistent with the statutory scheme as a whole, the Act's legislative history, and prior administrative and judicial interpretations. *Id.* at 312-316; see also *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 764 (1949) ("[W]e have * * * consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended contexts.").

The original 1970 version of FCRA exhibited a similar congressional intent that the term "person" be interpreted in the context of the provision in which it appeared. The 1970 Act included a provision, still in FCRA today, subjecting "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses" to a fine of up to $5000 or imprisonment for up to one year. § 619, 84 Stat. 1134 (15 U.S.C. 1681q). Congress could not have intended the term "person" in the context of that criminal provision to include the United States. (Nor, for that matter, should Congress be understood to have intended to subject States or municipalities to criminal liability in the absence of some more specific expression of intent.) Rather, Congress's use of the term "person" in that provision necessarily reflects an intent that the term "person" would *not* always be given its broadest possible statutory definition.

2. Congress displayed that same intent 26 years later, when it amended FCRA in the Consumer Credit Reporting Reform Act of 1996 (1996 Act). Pub. L. No. 104-208, §§ 2401 *et seq.*, 110 Stat. 3009-426. The 1996 Act significantly expanded the scope of FCRA beyond its original focus on consumer reporting agencies to extensively regulate persons who provide information

to reporting agencies and persons who make use of credit reports. The 1996 Act, for example, prohibited persons from procuring certain consumer information for employment purposes except in enumerated circumstances and restricted the ways in which employers may use consumer credit information in taking employment actions. §§ 2403, 2411, 110 Stat. 3009-431, 3009-443 to 3009-444 (15 U.S.C. 1681b(b)(2)-(3), 1681m(a)). The 1996 Act also modified the civil-remedies provisions to reflect the expanded scope of the statute. In particular, it amended those provisions to apply to "person[s]" rather than just to consumer reporting agencies and users of information. See § 2412(a) and (d), 110 Stat. 3009-446.

The 1996 amendments, like the 1970 Act, demonstrate that Congress did not intend the meaning of "person" to be the same across every provision. In addition to amending the civil-remedies provisions to apply to "person[s]," the 1996 amendments also added provisions authorizing FCRA enforcement suits to be brought by the Federal Trade Commission and the States against "person[s]" in certain circumstances. 1996 Act §§ 2417, 2418, 110 Stat. 3009-451 to 3009-452. As with the preexisting criminal provision, Congress, without expressly so providing, cannot be understood to have intended the United States to be a "person" subject to an enforcement action by a State or an agency of the federal government itself.

3. Nor is there any indication that Congress intended that the United States be a "person" for purposes of the newly-expanded civil-remedies provisions. Nothing in the legislative history of the 1996 Act suggests that Congress believed it was exposing the United States to

significant new liabilities. The House Report on an early version of the 1996 legislation noted only that extension of the liability provisions to "any person who" fails to comply with FCRA's requirements would bring within the scope of the provisions "persons who furnish information to consumer reporting agencies, such as banks and retailers." H.R. Rep. No. 486, 103d Cong., 2d. Sess. 49 (1994); see also S. Rep. No. 185, 104th Cong., 1st. Sess. 48-49 (1995).

This Court has previously refused to interpret amendments to an existing scheme as allowing new damages actions against a sovereign when neither the text nor history of the amendments themselves affirmatively demonstrate that Congress intended that result. In *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), the Court addressed the effect of a 1966 amendment to the Fair Labor Standards Act that added state hospitals to the statutory definition of "employer." *Id.* at 282-283. The Court recognized that, in combination with the preexisting statutory provision subjecting an "employer" to monetary liability, the "literal languag[e] of the amended Act permitted damages suits against States. *Id.* at 283. And the Court additionally believed that Congress might have the constitutional authority to abrogate state sovereign immunity in that fashion. *Id.* at 284. But the Court nevertheless concluded that the Act should not be construed to do so. *Id.* at 285-287. The Court reasoned that "Congress, acting responsibly, would not be presumed to take such action silently"; that there was "not a word in the history of the 1966 amendments to indicate a purpose of Congress" to subject States to suit in federal court; and that it would

"be surprising * * * to infer that Congress deprived [a State] of [its] constitutional immunity without changing the old [liability provision] or indicating in some way by clear language that the constitutional immunity was swept away." *Id.* at 284-285; see also *Library of Congress* v. *Shaw*, 478 U.S. 310, 319 (1986) (declining to construe amendment to Title VII of the Civil Rights Act of 1964 to subject the federal government to liability for interest).

The Court should similarly decline in this case to conclude that the 1996 FCRA amendments exposed the United States to potentially massive damages liability, in the absence of evidence that Congress actually considered and intended the interaction between statutory provisions enacted decades apart to have that result. The ordinary meaning of the term "person," particularly in the context of a provision creating damages liability, would not include the United States. See *International Primate Prot. League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 82 (1991) ("[I]n common usage, the term 'person' does not include the sovereign."); see, *e.g.*, *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 275 (1947) (same); see also, *e.g.*, *United States Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744-745 (2004) (discussing meaning of "person" in the Sherman Act); 1 U.S.C. 1 (default statutory definition of "person," which does not expressly include the United States). Several factors reinforce the conclusion that Congress would have had that typical meaning—which does not include the United States—in mind when it amended FCRA's civil-remedies provisions.

First, if the term "person" in the civil-remedies provisions were construed so broadly as to encompass "any

* * * government," including the United States, it would also necessarily include States. But Congress amended FCRA's civil-remedies provision to allow suits against "any person" only months after this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44, 47, 72 (1996), which held that Congress lacked authority under the Commerce Clause to abrogate state sovereign immunity to private damages actions. It would have been extraordinary if Congress had responded to *Seminole Tribe* with an attempt to subject States to both compensatory and punitive damages under FCRA; there is no indication that it sought to do so; and courts should avoid interpreting statutes to create potential constitutional infirmities. See, *e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005) (noting the "reasonable presumption that Congress did not intend [an interpretation] which raises serious constitutional doubt").

Second, Congress had demonstrated earlier in 1996 that when it wanted to allow damages actions against the United States under FCRA, it could and would do so expressly. A previous amendment to FCRA in 1996 had empowered the Federal Bureau of Investigation to obtain and use consumer information from consumer reporting agencies in limited circumstances for national security purposes. See Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, Tit. VI, § 601(a), 109 Stat. 974 (codified as amended at 15 U.S.C. 1681u). As part of that amendment, Congress provided that "[a]ny agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer" for statutory, actual, and (in certain circumstances) punitive damages. § 601, 109

Stat. 976-977 (15 U.S.C. 1681u(i)). Having so recently employed such explicit language in exposing the federal government to damages under FCRA, Congress can be expected to have done the same if it had intended to expose the federal government to damages liability in its amendments to FCRA's general civil-remedies provisions later that same year.

Third, Congress is unlikely to have intended the 1996 FCRA amendments to disrupt the carefully calibrated remedies available against the federal government under the Privacy Act of 1974. The Privacy Act, codified in relevant part at 5 U.S.C. 552a, comprehensively regulates Executive Branch agencies in their collection, maintenance, use, and dissemination of "records" containing information about an "individual," when those records are maintained as part of a "system of records." 5 U.S.C. 552a(a)(1)-(5) and (b). The Privacy Act authorizes a limited class of private civil actions to enforce its terms. 5 U.S.C. 552a(g); see *Cooper*, slip op. 18 (noting Congress's intent, in enacting the Privacy Act, "to cabin relief, not to maximize it").

If the Tucker Act permitted suits against the United States pursuant to FCRA's civil-remedies provisions, 15 U.S.C. 1681n and 1681*o*, then federal-agency activity already covered by the Privacy Act could expose the United States to far more liability than the Privacy Act contemplates. That could happen, for example, in a circumstance where a federal agency has disclosed to a consumer reporting agency an overdue debt that the federal agency is trying to collect—a type of disclosure that a federal agency is required by law to make under certain circumstances, see 31 U.S.C. 3711(e). If the disclosed record of the overdue debt contains an error, the

Privacy Act provides procedures whereby the individual to whom the record pertains can correct the record, see 5 U.S.C. 552a(d), and would require the federal agency to inform the consumer reporting agency about any correction, see 5 U.S.C. 552a(c)(4). FCRA contains analogous (but not identical) correction procedures and a notice requirement when there has been an error in a disclosure made by a "person" to a consumer reporting agency. See 15 U.S.C. 1681s-2(b).

The remedies for FCRA violations in that situation would be much broader than the remedies for the corresponding Privacy Act violations. The Privacy Act would authorize injunctive relief, but no money damages, for failure to correct the record, 5 U.S.C. 552a(g)(1)(B), and compensatory relief if "actual damages" resulted from an "intentional or willful" failure to update the consumer reporting agency about a correction, 5 U.S.C. 552a(g)(4); *Doe* v. *Chao*, 540 U.S. 614, 624-626 (2004). FCRA's civil-remedies provisions, on the other hand, would permit a damages suit not only for a failure to update the consumer reporting agency but also for a failure to correct the record, 15 U.S.C. 1681n, 1681*o*, 1681s-2(b); would permit either type of suit to be premised merely on negligence, without any need to prove intentional or willful conduct, 15 U.S.C. 1681*o*; and, in the case of a willful violation, would permit automatic statutory damages, without requiring any showing that the plaintiff sustained "actual damages." 15 U.S.C. 1681n(a)(1)(A).

There is no sound reason to believe that Congress intended the 1996 FCRA amendments to so dramatically expand the monetary liability of the United States for activities already within the ambit of the Privacy Act. The extent of liability under the Privacy Act was the

subject of extensive congressional debate: Congress considered and rejected amendments that would have allowed recovery for negligent violations or the award of punitive damages. See *Fitzpatrick* v. *IRS*, 665 F.2d 327, 330 (11th Cir. 1982), abrogated in part on other grounds by *Doe*, 540 U.S. 614. Multiple Members of Congress expressed concern about the harmful effect that such amendments would have on the federal fisc. See, *e.g.*, 120 Cong. Rec. 36,659-36,660 (1974) (Reps. McCloskey, Erlenborn, and Butler); *id.* at 36,956 (Rep. Butler). It is extremely unlikely that Congress, without even debating the matter, would have undermined the carefully crafted compromise it reached in the Privacy Act context by allowing far more substantial damages suits against the United States under FCRA.

Fourth, even putting the Privacy Act to one side, it remains telling that nowhere in the legislative history did any Member of Congress suggest or indicate any awareness that the 1996 FCRA amendments would expose the United States to liability. Cf. *Church of Scientology* v. *IRS*, 484 U.S. 9, 17-18 (1987) ("All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect [respondent] ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill."); see also *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 63 (2004). Because the federal government pervasively engages in the kinds of transactions covered by FCRA, and both uses and disseminates large quantities of the type of consumer-credit information FCRA regulates, the practical impact of imposing such liability would potentially be significant

and would be expected to have generated at least some congressional comment.

The claim at issue here is illustrative. Respondent's suit arises from a single credit-card transaction in which he paid a $350 federal-court filing fee using pay.gov, a federal-government website for processing online payments. Pet. App. 85a-86a. Respondent alleges that the government violated 15 U.S.C. 1681c(g)(1) by transmitting to his computer an electronic transaction receipt that contained the expiration date of his credit card. Pet. App. 86a-87a. On the basis of that single transaction, he seeks automatic statutory damages on behalf of all individuals who received such receipts on or after June 4, 2008, *id.* at 92a, a claim that potentially encompasses well over a million similar transactions. This Office is informed by the Department of the Treasury that 54 Executive departments, independent agencies, government corporations, and judicial- and legislative-branch entities together generate over 600 separate credit-card-transaction cash flows on pay.gov. The Department of Treasury is additionally aware of more than 400 credit-card transaction cash flows into the United States Treasury using systems other than pay.gov, an unknown number of which might be subject to similar claims.

Although the substantive FCRA provision on which respondent relies was enacted after the 1996 FCRA amendments (see Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, Tit. I, § 113, 117 Stat. 1959), the 1996 version of the statute contained provisions that could likewise give rise to substantial damages claims against the United States. For example, as discussed above (see pp. 48-49, *supra*), FCRA

requires "person[s]" who disclose information (*e.g.*, about an overdue debt) to consumer reporting agencies to conduct a timely investigation, and correct their disclosures, when the consumer disputes the information's accuracy to a consumer reporting agency. 15 U.S.C. 1681s-2(b); see 1996 Act § 2413, 110 Stat. 3009-448; see also *Talley* v. *United States Dep't of Agric.*, No. 07 C 0705, 2009 WL 303134 (N.D. Ill. Feb. 4, 2009) (awarding emotional-distress damages based on government's negligent violation of 15 U.S.C. 1681s-2), aff'd by equally divided court, No. 09-2123, 2010 WL 5887796 (7th Cir. Oct. 1, 2010).

The 1996 version of FCRA also regulated (and the current version still does regulate) a wide range of conduct by "person[s]" who use information obtained from consumer reporting agencies. In particular, it regulates the use by a "person" of a "consumer report," expansively defined to include "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living," when collected for the purpose of evaluating a consumer's fitness for certain loans, suitability for employment, or other enumerated purposes. 15 U.S.C. 1681a(d)(1). FCRA broadly provides, for example, that a "person shall not use or obtain a consumer report for any purpose" except as provided by FCRA. 15 U.S.C. 1681b(f); see 1996 Act § 2403, 110 Stat. 3009-433. FCRA additionally places conditions on the use of consumer reports by "person[s]" to take "adverse action" against employees and potential employees. 15 U.S.C. 1681b(b)(3); see 1996 Act § 2403, 110 Stat. 3009-431; see also 15 U.S.C.

1681a(k)(1)(B)(ii) (defining "adverse action"); 15 U.S.C. 1681b(b)(4) (exception to Section 1681b(b)(3), originally added in 1997, for certain cases involving national security).

Liability for federal agencies' violations of these provisions could make the United States a ubiquitous FCRA defendant. To begin with, the federal government is the Nation's largest employer. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Current Employment Statistics Survey (National)*, http://data.bls.gov/cgi-bin/surveymost?ce. In 1996, the federal government had over 2.7 million civilian executive employees (plus over 1.5 million military personnel and over 60,000 legislative and judicial employees). United States Office of Personnel Mgmt., *Total Government Employment Since 1962*, http://www.opm.gov/feddata/HistoricalTables/TotalGovernmentSince1962.asp. The numbers for more recent years are similar. *Ibid.* And the federal government often uses consumer reports for employment purposes (for example, to check the credit history of job applicants). See, *e.g.*, 15 U.S.C. 1681k(b).

The federal government is also the Nation's largest lender and creditor. Around the time that the pertinent FCRA amendments were enacted, the federal government reported nearly $1.2 trillion in outstanding guaranteed loans and non-tax receivables. Department of the Treasury, Financial Mgmt. Serv., *Annual Report to the Congress: U.S. Government Debt Collection Activities of Fed. Agencies* 7, http://www.fms.treas.gov/news/reports/debt99.pdf. In 1996, it had over $51 billion of delinquent (*i.e.*, overdue) debt owing to it. *Ibid.* By 2010, the amount of delinquent debt had grown to over $100 billion. *Fiscal Year 2010 Report to the Congress:*

U.S. Government Receivables and Debt Collection Activities of Fed. Agencies 4 (Mar. 2011), http://www.fms.treas.gov/news/reports/debt10.pdf. Delinquencies (*i.e.*, late or missed payments) can occur with some frequency in debt owed to the United States, because many "[f]ederal loan programs are authorized when private sector credit is unavailable or inadequate," resulting in the government's accumulation of "relatively high risk" debt. *Id.* at 5. Federal agencies have been authorized since 1983, and required since 1996, to report such delinquent accounts to consumer reporting agencies in certain circumstances. Act of Jan. 12, 1983, Pub. L. No. 97-452, § 1, 96 Stat. 2470; Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(k), 110 Stat. 1321-365.

It is highly improbable that Congress, without any affirmative indication or debate at all, would have exposed the federal Treasury to a multiplicity of FCRA suits arising out of commonplace governmental activities such as employment and lending. The concern that courts might mistakenly impose burdens on the public fisc that Congress did not actually contemplate provides one of the principal reasons for insisting on a clear and unequivocal congressional waiver of sovereign immunity. See *OPM* v. *Richmond*, 496 U.S. 414, 428, 432 (1990); see also *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001) ("In traditionally sensitive areas, . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (citations omitted). Even when the Tucker Act is asserted to provide the necessary waiver, "this Court has not lightly inferred the United States' consent to suit."

Mitchell II, 463 U.S. at 218. In light of all the evidence that Congress did not intend any such consent with respect to FCRA, the Federal Circuit's decision here would be insupportable even assuming the Tucker Act's framework applied. *A fortiori*, FCRA does not contain the clear waiver of sovereign immunity required to subject the United States to suit for damages under a statute of general applicability.

* * * * *

Because neither the Tucker Act nor Little Tucker Act provides a basis for FCRA claims against the United States, the Federal Circuit erred in concluding that it, rather than the Seventh Circuit, had jurisdiction over respondent's appeal. Compare 28 U.S.C. 1291 (regional circuit jurisdiction over final decisions of district courts), with 28 U.S.C. 1295(a)(2) (Federal Circuit jurisdiction only over a limited class of appeals from district courts, including Little Tucker Act claims). The Federal Circuit's error on that "threshold" question of appellate jurisdiction, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 178 (1988), requires that its decision be vacated and the appeal transferred to the Seventh Circuit. The Seventh Circuit can then address (if necessary) whether respondent has standing to bring his class-action claim, see Cert. Reply Br. 10-11, and (if necessary) whether FCRA's remedial scheme itself, separate and apart from the Tucker Acts, contains an "unequivocal expression" of Congress's intent to waive the protections of sovereign immunity, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded with instructions that it be transferred to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted.

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APPENDIX

1. 15 U.S.C. 1681a provides in pertinent part:

Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) CONSUMER REPORT.—

(1) IN GENERAL.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) EXCLUSIONS.—Except as provided in paragraph (3), the term "consumer report" does not include—

(A) subject to section 1681s-3 of this title, any—

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (*o*) or (x) of this section.

(3) RESTRICTION ON SHARING OF MEDICAL INFORMATION.—Except for information or any communication of information disclosed as provided in section 1681b(g)(3) of this title, the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is—

(A) medical information;

(B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or

(C) an aggregate list of identified consumers based on payment transactions for medical products or services.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

* * * * *

2. 15 U.S.C. 1681b (2006 & Supp. IV 2010) provides in pertinent part:

Permissible purposes of consumer reports

* * * * *

(b) Conditions for furnishing and using consumer reports for employment purposes

* * * * *

(3) Conditions on use for adverse actions

(A) In general

Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates—

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the [Consumer Financial Protection] Bureau under section 1681g(c)(3) of this title.

(B) Application by mail, telephone, computer, or other similar means

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 1681m(a) of this title, within 3 business days of taking such action, an oral, written or electronic notification—

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the

specific reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the [Consumer Financial Protection] Bureau under section 1681g(c)(3) of this title.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if—

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer

and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(4) Exception for national security investigations

(A) In general

In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that—

(i) the consumer report is relevant to a national security investigation of such agency or department;

(ii) the investigation is within the jurisdiction of such agency or department;

(iii) there is reason to believe that compliance with paragraph (3) will—

(I) endanger the life or physical safety of any person;

(II) result in flight from prosecution;

(III) result in the destruction of, or tampering with, evidence relevant to the investigation;

(IV) result in the intimidation of a potential witness relevant to the investigation;

(V) result in the compromise of classified information; or

(VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.

(B) Notification of consumer upon conclusion of investigation

Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made—

(i) a copy of such consumer report with any classified information redacted as necessary;

(ii) notice of any adverse action which is based, in part, on the consumer report; and

(iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

(C) Delegation by head of agency or department

For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her authorities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the Senior Ex-

ecutive Service or equivalent civilian or military rank.

(D) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Classified information

The term "classified information" means information that is protected from unauthorized disclosure under Executive Order No. 12958 or successor orders.

(ii) National security investigation

The term "national security investigation" means any official inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.

* * * * *

(f) Certain use or obtaining of information prohibited

A person shall not use or obtain a consumer report for any purpose unless—

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and

(2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

* * * * *

3. 15 U.S.C. 1681c provides in pertinent part:

Requirements relating to information contained in consumer reports

* * * * *

(g) Truncation of credit card and debit card numbers

(1) In general

Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

(2) Limitation

This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.

(3) Effective date

This subsection shall become effective—

(A) 3 years after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is in use before January 1, 2005; and

(B) 1 year after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is first put into use on or after January 1, 2005.

* * * * *

4. 15 U.S.C. 1681n (2006 & Supp. IV 2010) provides:

Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance

For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

5. 15 U.S.C. 1681*o* provides:

Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

6. 15 U.S.C. 1681p provides:

Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in

controversy, or in any other court of competent jurisdiction, not later than the earlier of—

(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or

(2) 5 years after the date on which the violation that is the basis for such liability occurs.

7. 15 U.S.C. 1681q provides:

Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, imprisoned for not more than 2 years, or both.

8. 15 U.S.C. 1681s (2006 & Supp IV 2010) provides in pertinent part:

Administrative enforcement

(a) Enforcement by Federal Trade Commission

(1) In general

The Federal Trade Commission shall be authorized to enforce compliance with the requirements imposed by this subchapter under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other

Government agency under any of subparagraphs (A) through (G) of subsection (b)(1), and subject to subtitle B of the Consumer Financial Protection Act of 2010, subsection (b). For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce, in violation of section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)), and shall be subject to enforcement by the Federal Trade Commission under section 5(b) of that Act with respect to any consumer reporting agency or person that is subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this subchapter and to require the filing of reports, the production of documents, and the appearance of witnesses, as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter. Any person violating any of the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions of such Act are part of this subchapter.

(2) Penalties

(A) Knowing violations

Except as otherwise provided by subtitle B of the Consumer Financial Protection Act of 2010, in the event of a knowing violation, which constitutes a pattern or practice of violations of this subchapter, the Federal Trade Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this subchapter. In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation.

(B) Determining penalty amount

In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of such prior conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(C) Limitation

Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 1681s-2(a)(1) of this title, unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.

* * * * *

(c) State action for violations

(1) Authority of States

In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this subchapter, the State—

(A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;

(B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover—

(i) damages for which the person is liable to such residents under sections 1681n and 1681o of this title as a result of the violation;

(ii) in the case of a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, damages for which the person would, but for section 1681s-2(c) of this title, be liable to such residents as a result of the violation; or

(iii) damages of not more than $1,000 for each willful or negligent violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Federal regulators

The State shall serve prior written notice of any action under paragraph (1) upon the Bureau and the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) of this section and provide the Bureau and the Federal Trade Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Bureau and the Federal Trade Commission or appropriate Federal regulator shall have the right—

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(3) Investigatory powers

For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation on State action while Federal action pending

If the Bureau, the Federal Trade Commission, or the appropriate Federal regulator has instituted a civil action or an administrative action under section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818] for a violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Bureau, the Federal Trade Commission, or the appropriate Federal regulator for any violation of this subchapter that is alleged in that complaint.

(5) Limitations on State actions for certain violations

(A) Violation of injunction required

A State may not bring an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, unless—

(i) the person has been enjoined from committing the violation, in an action brought by the State under paragraph (1)(A); and

(ii) the person has violated the injunction.

(B) Limitation on damages recoverable

In an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, a State may not recover any damages in-

curred before the date of the violation of an injunction on which the action is based.

* * * * *

9. 15 U.S.C. 1681s-2 provides in pertinent part:

Responsibilities of furnishers of information to consumer credit reporting agencies

* * * * *

(b) Duties of furnishers of information upon notice of dispute

(1) In general

After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall—

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;

(C) report the results of the investigation to the consumer reporting agency;

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and

(E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly—

(i) modify that item of information;

(ii) delete that item of information; or

(iii) permanently block the reporting of that item of information.

(2) Deadline

A person shall complete all investigations, reviews, and reports required under paragraph (1) regarding information provided by the person to a consumer reporting agency, before the expiration of the period under section 1681i(a)(1) of this title within which the consumer reporting agency is required to complete actions required by that section regarding that information.

* * * * *

10. 15 U.S.C. 1681u provides in pertinent part:

Disclosures to FBI for counterintelligence purposes

(a) Identity of financial institutions

Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish to the Federal Bureau of Investigation the names and addresses of all financial institutions (as that term is defined in section 3401 of title 12) at which a consumer maintains or has maintained an ac-

count, to the extent that information is in the files of the agency, when presented with a written request for that information, signed by the Director of the Federal Bureau of Investigation, or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this section. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing, that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(b) Identifying information

Notwithstanding the provisions of section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment, to the Federal Bureau of Investigation when presented with a written request, signed by the Director or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this subsection. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that such information is sought for the conduct

of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

* * * * *

(e) Payment of fees

The Federal Bureau of Investigation shall, subject to the availability of appropriations, pay to the consumer reporting agency assembling or providing report or information in accordance with procedures established under this section a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching, reproducing, or transporting books, papers, records, or other data required or requested to be produced under this section.

(f) Limit on dissemination

The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

* * * * *

(i) Damages

Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of—

(1) $100, without regard to the volume of consumer reports, records, or information involved;

(2) any actual damages sustained by the consumer as a result of the disclosure;

(3) if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and

(4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.

(j) Disciplinary actions for violations

If a court determines that any agency or department of the United States has violated any provision of this section and the court finds that the circumstances surrounding the violation raise questions of whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee who was responsible for the violation.

(k) Good-faith exception

Notwithstanding any other provision of this subchapter, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or identifying information pursuant to this subsection in good-faith reliance upon a certification of the Federal Bureau of Investigation pursuant to provisions of this section shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(*l*) Limitation of remedies

Notwithstanding any other provision of this subchapter, the remedies and sanctions set forth in this section shall be the only judicial remedies and sanctions for violation of this section.

(m) Injunctive relief

In addition to any other remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section. In the event of any successful action under this subsection, costs together with reasonable attorney fees, as determined by the court, may be recovered.

RESPONDENT'S BRIEF

No. 11-192

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES X. BORMES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENT'S BRIEF

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July 2012

QUESTION PRESENTED

Whether the Little Tucker Act's waiver of sovereign immunity for claims "against the United States founded ... upon ... any Act of Congress," 28 U.S.C. § 1346(a)(2), includes claims brought against the United States under the Fair Credit Reporting Act, which provides a cause of action for damages against any "government." 15 U.S.C. §§ 1681a(b), 1681n, 1681o.

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Prepared Statement of the Federal Trade Commission on The Fair Credit Reporting Act: Before the S. Comm. on Banking, Housing, and Urban Affairs, 108th Cong. (2003) 1

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STATEMENT

A. Congress passed the Fair Credit Reporting Act (FCRA) "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). The FCRA provides a private right of action for damages against any "person" who violates its requirements. 15 U.S.C. § 1681c(g)(1). The statute defines "person" to mean "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." *Id.* § 1681a(b).

Responding to a surge in identity theft that had "reached almost epidemic proportions," H.R. Rep. No. 108-263, at 25 (2003), Congress in 2003 amended the FCRA to "protect consumers from identity thieves" by "limit[ing] the number of opportunities for identity thieves to 'pick off' key card account information." S. Rep. No. 108-166, at 3 (2003). Identity theft occurs when someone uses another person's identifying information, such as a social-security number or credit account number, to fraudulently obtain credit, bank loans, employment, or utility or cell phone service. *See Prepared Statement of the Federal Trade Commission on The Fair Credit Reporting Act: Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 6 (2003). The Fair and Accurate Credit Transactions Act, enacted as an amendment to the FCRA, prohibits any "person" who "accepts credit cards or debit cards for the transaction of business" from "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1).

To ensure an adequate opportunity to comply with the law, the Federal Trade Commission extensively publicized the new requirements, and Congress delayed implementation of the requirements until January 1, 2005, for new credit-card receipt equipment, and until December 4, 2006, for equipment in use prior to January 1, 2005. *Id.* § 1681c(g)(3).

B. After the law's effective date, respondent James Bormes used the government's online pay.gov payment system to pay a $350 filing fee using his personal credit card. Pet. App. 86a. A receipt for the payment—displayed on his computer screen and sent in an emailed confirmation—included his credit card's expiration date. *Id.* at 87a. Bormes filed suit in the U.S. District Court for the Northern District of Illinois on behalf of himself and others similarly situated, alleging that the receipt violated § 1681c(g)(1). *Id.* at 81a.

As the basis for jurisdiction in the district court, Bormes relied on the FCRA's jurisdictional provision, 15 U.S.C. § 1681p, which provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court" or "any other court of competent jurisdiction." Pet. App. 82a-84a. In addition, Bormes alleged jurisdiction under the Little Tucker Act, which provides concurrent jurisdiction in the federal district courts and the Court of Federal Claims for claims "not exceeding $10,000 in amount, founded ... upon ... any Act of Congress." *Id.* § 1346(a)(2).[1]

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[1] The Little Tucker Act works in conjunction with the Tucker Act, which provides jurisdiction in the Court of Federal Claims for claims of any value. 28 U.S.C. § 1491(a)(1).

The district court dismissed the case. Relying on this Court's holding that the United States is immune from suit "except where Congress has 'unequivocally expressed' a waiver of immunity," the court held that the FCRA's express application to any "government" did not "unequivocally express[]" a waiver because Congress did not "expressly insert[] the specific term 'United States' into the statutory language." Pet. App. 27a-28a (quoting *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992)). The court did not address Bormes's alternative claim that the Little Tucker Act independently waives the federal government's sovereign immunity for FCRA claims.

C. Bormes appealed the district court's decision to the Federal Circuit. Pet. App. 18a. Although the Seventh Circuit would ordinarily have had jurisdiction over an appeal from a decision of an Illinois federal district court, Bormes based his appeal on 28 U.S.C. § 1295(a)(2), which provides the Federal Circuit with exclusive jurisdiction over "an appeal from a final decision of a district court of the United States ... if the jurisdiction of that court was based, in whole or in part, on" the Little Tucker Act. Pet. App. 19a.

The government moved to transfer the case to the Seventh Circuit, arguing that the FCRA's jurisdictional provision controlled, not the Little Tucker Act's, and thus that the appeal should have been filed in the Seventh Circuit under 28 U.S.C. § 1291. Pet. App. 18a-22a. A motions panel of the Federal Circuit disagreed, holding that the Federal Circuit was the proper forum for appeal of Bormes's claims because those claims were based in part on the Little Tucker Act. *Id.*

Following briefing and argument on the merits of the appeal, the Federal Circuit vacated the district

court's decision. *Id.* at 1a-17a. The Federal Circuit held that the FCRA's creation of a cause of action against the "government"—which the government conceded at oral argument includes the United States—fell within the Little Tucker Act's waiver of immunity for claims "against the United States founded ... upon ... any Act of Congress." *Id.* Because Bormes's claims fell within the scope of the Little Tucker Act's waiver, and because Congress had not indicated its intent to withdraw the Little Tucker Act's remedy for FCRA claims, the Federal Circuit concluded that the Little Tucker Act waived sovereign immunity for FCRA claims. *Id.* at 7a, 13a. The court did not reach the question whether the FCRA's provision of a cause of action against any "government" is sufficient, in the absence of the Little Tucker Act, to waive sovereign immunity. *Id.* at 7a-8a.

SUMMARY OF ARGUMENT

A. The Tucker Act, 28 U.S.C. § 1491(a)(1), and Little Tucker Act, 28 U.S.C. § 1346(a)(2), waive the federal government's sovereign immunity for claims brought under "any Act of Congress" that can "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (*Mitchell II*). Claims under the FCRA easily satisfy that test—they are founded on an "Act of Congress" and provide for monetary damages against any "person," which the statute expressly defines to include any "government." 15 U.S.C. §§ 1681a(b), 1681n, 1681o.

Despite the FCRA's clear language, the government argues that the statute cannot fairly be interpreted to provide for damages against the United States because, when Congress amended the FCRA's civil-remedies provisions in 1996 to apply to any "person," it did not ex-

pressly state that it intended the word "person" to conform with the statutory definition. This Court, however, has already rejected the government's effort to impose such an express-statement standard on Tucker Act claims. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). As the Court explained, the Tucker Acts already provide the required sovereign-immunity waiver, and statutes falling within the Tucker Acts' scope thus need not provide a second express waiver of immunity. *Id.* Rather, it is enough that the statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 472.

Even if a separate express waiver of sovereign immunity were required, the FCRA would satisfy that requirement. The FCRA expressly defines "person" to include any "government," and the 1996 amendments must be read in conjunction with that definition. Courts cannot assume that Congress is ignorant of an existing statutory provision, especially when the provision is a definition of a key term. Indeed, it defies belief that Congress could have amended the FCRA's civil-remedies provisions to apply to any "person" without realizing that the statute defined that word.

Aside from Congress's express definition, there are other indications that Congress understood "person" to include the federal government. The 1996 amendments imposed new restrictions on any "person" using a consumer report for employment purposes, but Congress soon after created a limited exception for federal agencies. 15 U.S.C. § 1681b(b). If federal agencies were not "person[s]" under the FCRA, the exception would have been unnecessary. Moreover, related statutes that share the FCRA's definition of "person" contain explicit limits

on the government's liability that are absent from the FCRA. The Truth in Lending Act expressly preserves governmental immunity for civil and criminal penalties, 15 U.S.C. § 1612, while the Equal Opportunity Employment Act exempts government entities from punitive, but not actual, damages. 15 U.S.C. § 1691e(b). Congress's selective exclusion of government entities from liability demonstrates its awareness that those entities would otherwise have faced liability under definitions of "person" identical to the FCRA's.

The government does not dispute that the term "person" includes the United States in some contexts, but argues that the term's "ordinary meaning"—which the government says excludes the United States—should apply for purposes of the statute's civil-remedies provisions. The government advances four reasons to read the statute this way, but none comes close to a justification for setting aside the FCRA's plain language.

First, the government argues that Congress would not likely have imposed liability on state governments in 1996, shortly after this Court held in *Seminole Tribe v. Florida* that Congress lacks the authority to abrogate state sovereign immunity under its Commerce Clause power. 517 U.S. 44 (1996). But Congress drafted the FCRA's amended civil-remedies provisions long before *Seminole Tribe*, and there is no indication that the decision caused Congress to exclude states, much less the federal government, from the statute's coverage.

Second, Congress's express imposition of liability on federal agencies in a section of the FCRA applying to the FBI, 15 U.S.C. § 1681u, indicates only that Congress intended the liability provision as a remedy for government abuse under that section. It does not suggest that

Congress intended to exclude government entities from other liability that applies more broadly to any "person."

Third, the government's broad characterization of Congress's intent to limit the waiver of sovereign immunity in the Privacy Act, 5 U.S.C. 552a, sheds no light on the scope of the FCRA's waiver. The two statutes, though overlapping to some degree, were passed at different times and cover different subjects. Because the statutes are capable of coexisting without modification, there is no basis for reading the Privacy Act's independent sovereign-immunity waiver as a limitation on liability under the FCRA.

Fourth, the legislative history of the 1996 amendments does nothing to undermine the FCRA's plain language. Even clear legislative history cannot undermine unambiguous statutory text, and an *absence* of legislative history certainly cannot do so.

B. Because the FCRA falls within the scope of the Tucker Acts' jurisdictional grant, the Tucker Acts' waiver of sovereign immunity applies unless Congress withdrew the waiver in the FCRA. Such a withdrawal cannot be presumed, but must be unambiguously expressed.

The government argues that Congress intended the Tucker Acts to serve as a comprehensive remedial regime that applies only to claims that would otherwise lack a judicial damages remedy. But the Tucker Acts' plain language applies to claims under *any* Act of Congress, not just those without remedies, and the cases on which the government relies do not support its position. Those cases each involved statutes in which Congress intended to limit judicial review of certain claims, and in which allowing a claim under the Tucker Acts would have allowed plaintiffs to circumvent that limit. But Congress's intent to foreclose the Tucker Acts' remedy

must be clearly expressed, and none of the government's cases suggests that a statute's provision of a remedial regime is sufficient to indicate that intent.

The government identifies no statutory limits common to all "remedial statutes" that claims under the Tucker Acts would allow parties to circumvent. The government argues only that the Tucker Acts would allow plaintiffs to rely on substantive statutory claims for damages under the FCRA "while invoking the Tucker Act to remove any sovereign-immunity limitation." U.S. Br. 25. That, however, is precisely the function that the Tucker Acts are supposed to serve. The Tucker Acts do not create substantive damages claims; they simply provide jurisdiction and waive sovereign immunity for claims premised on other sources of law. The government's concern about circumvention of sovereign-immunity limits is particularly misplaced when applied to FCRA claims, which expressly provide claims against the federal government. The government's position that remedial statutes fall outside the Tucker Acts' scope would mean that, by expressly creating a cause of action for damages against the "government," the FCRA eliminated the means for obtaining that relief.

In the alternative, the government argues that, even if some remedial statutes are capable of coexistence with the Tucker Acts, particular features of the FCRA render it incompatible with the Tucker Acts' remedial scheme. But statutes are presumed to be compatible with the Tucker Acts as long as the statutes are capable of coexistence. The features of the FCRA on which the government relies here do not conflict with the Tucker Acts and do not distinguish the FCRA from other typical federal statutes.

The FCRA's grant of jurisdiction to district courts is merely an application of the default rule for cases arising under federal law. Especially given the statute's additional allowance of jurisdiction in "any other court of competent jurisdiction," 15 U.S.C. § 1681p, the FCRA's jurisdictional provision cannot be read as a clear statement of Congress's intent to foreclose the Tucker Acts' remedy. Nor does the FCRA's two-year statute of limitations render it incompatible with the Tucker Acts. This Court has held that the Tucker Acts' six-year limitations period provides only an outside limit on the time in which to file suit, and statutory claims brought under the Tucker Acts may provide a shorter period. *See United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 8 (2008). Thus, none of the FCRA's features on which the government relies even suggests, much less unambiguously demonstrates, Congress's clear intent to withdraw the Tucker Acts' remedy.

C. The government is also wrong that FCRA claims are excluded from the Tucker Acts based on the Acts' exclusion of claims "sounding in tort." The Tucker Acts waive sovereign immunity over five separate classes of claims, but the tort exclusion modifies only the last of those: claims "for liquidated or unliquidated damages not sounding in tort." 28 U.S.C. § 1346(a)(2); 28 U.S.C. § 1491(a)(1). Thus, the Acts' plain language waives sovereign immunity for claims based on "*any* Act of Congress," regardless of whether the claims "sound[] in tort." 28 U.S.C. § 1346(a)(2) (emphasis added); 28 U.S.C. § 1491(a)(1). Although this Court's early cases adopted inconsistent interpretations of the tort exclusion's scope, the Court since 1933 has consistently applied the Tucker Acts to statutory and constitutional claims without asking whether the claims sound in tort. *See Jacobs v. United States*, 290 U.S. 13, 27 (1933).

Even assuming that the Tucker Acts' tort exclusion applies to claims based on federal statutes, the exclusion would not apply here because the FCRA claim in this case is not a tort. Although the government's definition of "tort" to include any legal wrong independent of contract would include FCRA claims, treatises from around the time Congress passed the Tucker Acts recognize the government's definition as incomplete. As these authorities explain, a tort is a legal wrong for which the *common law* provides a remedy for damages. When a remedy is provided by statute—as in the FCRA—the claim is not a tort. The government primarily relies on *Schillinger v. United States* for its argument that statutory claims can constitute torts. 155 U.S. 163 (1894). The patent statute at issue in *Schillinger*, however, provided for an "action on the case," which courts at the time interpreted as creating a common-law claim for trespass. In contrast, there is no common-law cause of action analogous to the FCRA's claim for printing credit card numbers and expiration dates.

The government's definition of "tort" to include all non-contractual wrongs would lead to other problems. It would define statutory claims as torts, even though such claims are not covered by the Federal Tort Claims Act. And it would render meaningless all the classes of claims under the Tucker Acts other than those founded on contracts, thus flying in the face of this Court's decisions recognizing non-contractual Tucker Act claims.

ARGUMENT

I. The FCRA Falls Within the Scope of the Tucker Acts' Sovereign Immunity Waiver.

As sovereign, the "United States may not be sued without its consent and ... the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*,

463 U.S. 206, 212 (1983) (*Mitchell II*). Accordingly, jurisdiction over a suit against the federal government requires both "a clear statement from the United States waiving sovereign immunity," and "a claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citations omitted). Both requirements are satisfied here.

A. The Tucker Acts Waive Sovereign Immunity for "Any Act of Congress" that Authorizes Damages Claims Against the United States.

Both the Tucker Act, 28 U.S.C. § 1491, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), provide federal jurisdiction over "[a]ny ... civil action or claim against the United States" that is founded on, among other things, "the Constitution, or any Act of Congress, or any regulation of an executive department." This language provides the "clear statement" required for a waiver of sovereign immunity. *See White Mountain Apache Tribe*, 537 U.S. at 472 ("The Tucker Act contains such a waiver."); *see also Mitchell II*, 463 U.S. at 218 ("The Tucker Act itself provides the necessary consent.").

To fall within the scope of the Tucker Acts' waiver, a claim must be one for money damages against the United States. *Mitchell II*, 463 U.S. at 218. Moreover, the "Act of Congress" or other source of law on which the claim is based must "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Id.* "[I]f a claim falls within this category, the existence of a waiver of sovereign immunity is clear." *Id.* at 218.

B. The FCRA Is an "Act of Congress" that Expressly Creates a Damages Claim Against the United States.

The FCRA falls squarely within the scope of the Tucker Acts' sovereign-immunity waiver. The statute is indisputably an "Act of Congress," which the government concedes is "literally encompasse[d]" by the Tucker Acts. U.S. Br. 20. Moreover, by its express language, the FCRA "create[s] substantive rights to money damages" against the United States. *Mitchell II*, 463 U.S. at 218. Specifically, the FCRA provides a right of action for damages against "any person" who violates the Act's requirements, and expressly defines "person" to include "any ... government or governmental subdivision or agency." 15 U.S.C. § 1681a(b). Two separate sections of the FCRA subject "[a]ny *person*" to damages for willfully or negligently "fail[ing] to comply with any requirement imposed" by the Act. 15 U.S.C. §§ 1681n, 1681o (emphasis added). One such requirement—the one at issue in this case—provides that "no *person* that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1) (emphasis added). The FCRA's plain language thus subjects "any ... government," including the United States, to monetary liability for printing receipts that include the prohibited credit card information.

Despite the FCRA's straightforward language, the government argues that the FCRA cannot be "fairly interpreted" to allow damages claims against the United States for two general reasons. First, the government argues that Congress did not expressly state that the

word "person," as used in the FCRA's liability provisions (as opposed to its definitional provisions), includes the United States. Second, the government points to four factors that it argues show that Congress did not intend the United States to be considered a "person" under the Act. The government is wrong on both counts.

1. The FCRA Expressly Subjects Any "Person," Including Any "Government," to Liability for Damages.

The government claims an "absence of evidence" that Congress considered the FCRA's definition of "person" when it subjected "any person" to liability for violating the statute's requirements. U.S. Br. 46. The government contends that, when Congress defined the term "person" in 1970, the FCRA did not impose significant liability on the government because the statute's liability provisions at that time did not apply to "person[s]," but to "consumer reporting agenc[ies]" and "user[s] of information." U.S. Br. 22-23. It then argues that, when Congress amended the liability provisions in 1996 to cover any "person," it did not expressly state in the statute's text or legislative history that it intended the word "person," already defined in the FCRA to include the "government," to conform to the existing statutory definition. *Id.* This Court should reject the government's invitation to read Congress's express definition out of the statute. *See U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 504 (1993) (refusing to "read words out of the statute").

A. The government's argument that Congress should have provided an express statement about the meaning of "person" in the 1996 amendments derives from cases in which this Court required a clear manifestation of Congress's intent to abrogate sovereign immunity. See U.S. Br. 45-46. The government relies on *Em-*

ployees of the Department of Public Health & Welfare, in which this Court held that state hospitals were immune from liability under the Fair Labor Standards Act because Congress had not stated in "clear language" its intent to abrogate state immunity. 411 U.S. 279 (1973). The government also relies on *Library of Congress v. Shaw*, which held that the United States was immune to awards of interest in the absence of an express statement that specifically and unambiguously waived the federal government's sovereign immunity to such awards. 478 U.S. 310, 319 (1986).

Those cases, however, did not involve claims under the Tucker Acts, and the standards they set forth are inapplicable here. Because the Tucker Acts waive the government's sovereign immunity for claims based on "any Act of Congress," Congress "need not provide a second waiver of sovereign immunity" for statutes that fall within its scope. *White Mountain Apache Tribe*, 537 U.S. at 472-73 (quoting *Mitchell II*, 463 U.S. at 218-19). Thus, when a case is brought against the United States under the Tucker Acts, "the separate statutes and regulations need not ... be construed in the manner appropriate to waivers of sovereign immunity." *Id.* Rather, it is enough that the statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 472. This "fair interpretation" standard "demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity," requiring only a statute that is "reasonably amenable to the reading that it mandates a right of recovery in damages." *Id.*

Although the government purports to apply the "fair interpretation" test, U.S. Br. 40, its insistence that Congress expressly confirm that it "considered and intend-

ed" the statute's plain meaning, U.S. Br. 46, is in fact an "express statement" test of the sort this Court applies to waivers of sovereign immunity. This Court has already rejected a similar effort by the government to "substitute a plain and explicit statement standard for the [Tucker Acts'] less demanding requirement of fair inference." *White Mountain Apache Tribe*, 537 U.S. at 477. In *White Mountain Apache Tribe*, the Court rejected the government's "demand [for] an explicit provision for money damages to support every claim that might be brought under the Tucker Act," holding that the statute's creation of a trust relationship between the federal government and the tribe was sufficient—even in the absence of an express liability provision—to create a "fair inference that the Government [was] subject to duties as a trustee and liable in damages for breach." *Id.*; *see also Mitchell II*, 463 U.S. 206 (inferring a damages claim against the government under a different trust statute). At the very least, the FCRA's *express* imposition of liability against any "government" is as "reasonably amenable" to a reading that it creates a damages claim against the United States as those statutes for which this Court has found such a claim to be merely *implied* by the statutory text.

B. Even if the Tucker Acts required a separate express statement waiving sovereign immunity, the FCRA would satisfy that requirement here. The express-statement requirement derives from the presumption that a sovereign—absent a clear statement to the contrary—has not waived its immunity to suit. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008). But the presumption does not "displace[] the other traditional tools of statutory construction," *id.*, including the "cardinal canon ... that courts must assume that a legislature says in a statute what it means and means in a

statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see also FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) ("What we ... require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools."). The presumption thus does not justify disregarding a statute's plain language. *See Richlin Sec. Serv. Co.*, 553 U.S. at 590 (declining to rely on presumption against waiver of sovereign immunity when there was no "ambiguity left ... to construe"); *United States v. Rice*, 327 U.S. 742 (1946) (same). For the doctrine to come into play, a statute must at least be "susceptible of ... interpretations that do not authorize monetary relief." *Nordic Vill. Inc.*, 503 U.S. at 34; *Cooper*, 132 S. Ct. at 1448 (same).

There is no ambiguity under the FCRA. The statute expressly defines the term "person" to include "*any* ... government or governmental subdivision or agency." 15 U.S.C. § 1681a(b) (emphasis added); *see Meese v. Keene*, 481 U.S. 465, 484 (1987) (recognizing "the respect we normally owe to the Legislature's power to define the terms that it uses in legislation"); *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) ("Statutory definitions control the meaning of statutory words ... ."). The phrase "any ... government," by its plain language, includes the federal government. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980) (describing "any" as "expansive language [that] offers no indication whatever that Congress intended" to limit a statute's reach). The FCRA's imposition of liability on any "person"—and thus on any "government"—unambiguously waives the federal government's sovereign immunity. *See Moore v. U.S. Dep't of Agric.*, 55 F.3d 991, 994 (5th Cir. 1995) (holding that a materially identical definition of "person" in the Equal Credit Opportunity Act "une-

quivocally expresse[d] Congress' intention[]" that "governmental entities are liable under the Act").

That Congress did not expressly redefine "person" in the text of the 1996 FCRA amendments does not mean, as the government suggests, that the word as used in the amendments lacks a defined statutory meaning. The amendments did not create a new, freestanding statute—they amended the FCRA and thus must be interpreted as part of that already-existing statutory scheme. *See Texas v. E. Texas R. Co.*, 258 U.S. 204, 217 (1922) (holding that "amendments ... are to be read in connection with [the amended statute] and with other amendments of it"). Because the FCRA already defined the word "person" when Congress amended the statute in 1996, the amendments must be read in conjunction with that definition "as if [they] were originally incorporated" in the Act. *Pennsylvania Co. v. United States*, 236 U.S. 351, 362 (1915); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.5 (1999) (holding that an amendment to the Communications Act was "*part of*" the Act, the existing provisions of which Congress must have been aware). Congress is not required to clutter statutes with redundant definitions every time it amends a statute, and, in light of the existing definition, Congress's decision not to redefine "person" in the 1996 amendments signifies only that "nothing more need be said." *Burns v. United States*, 501 U.S. 129, 136 (1991); *see also United States v. Singleton*, 16 F.3d 1419, 1428 (5th Cir. 1994) (holding that Congress is not required "to repeat itself, restating in each subsequent enactment an intention Congress thought it clearly expressed once already").

Indeed, given the statutory definition of "person," the lack of any indication, much less express statement, that Congress intended the word under the 1996

amendments to have a meaning other than its statutory definition is dispositive here. When Congress acts against the background of existing legislation, courts "should assume that [it] was aware" of the law's existing provisions, and should avoid "any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882). Thus, an amendment's use of language from the original statute signals Congress's intent—absent evidence to the contrary—to adopt that language's established meaning. *See FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1184 (2011) (holding that, where an amendment used a word that already existed in the statute, Congress intended the word to have the same meaning). That principle is especially true when the language at issue is Congress's definition of a critical statutory term. As this Court wrote in *Sorenson v. Secretary of the Treasury*, "it defies belief that Congress [could be] unaware," when amending a statute, of a term it "had previously expressly defined." 475 U.S. 851 (1986).

C. That the word "person," as used in the FCRA's 1996 amendments, conforms to the word's statutory definition is reinforced by Congress's use of the word in the statute's substantive provisions. The 1996 amendments imposed two new requirements on "person[s]" who use credit reports for employment purposes. 15 U.S.C. § 1681b(b). First, the amendments prohibit any "person" from obtaining a consumer report for employment purposes without first providing notice to the consumer and obtaining written authorization. *Id.* § 1681b(b)(2). Second, the amendments prohibit the "person" obtaining the consumer report from taking any "adverse action" based on the report before providing the consumer a copy of the report and a written description of the consumer's rights under the FCRA. *Id.* § 1681b(b)(3). The

following year, however, Congress adopted an "exception" to the "adverse action" requirement under § 1681b(b)(3). *See* Intelligence Authorization Act for Fiscal Year 1998, Pub. L. No. 105-107, § 311, 111 Stat. 2248 (codified at 15 U.S.C. § 1681(b)(4)). The exception provides that § 1681b(b)(3)'s notice requirements "shall not apply" to "an agency or department of the United States Government" if the agency makes written findings that the report is "relevant to a national security investigation" and that there is a specific need for secrecy. 15 U.S.C. § 1681b(b)(4)(A).

These requirements, and the associated exception, demonstrate Congress's understanding that the word "person," as used in the 1996 amendments, includes government entities. If federal agencies were not "person[s]" under the FCRA, they would not be subject to the requirements of the section, and the exception would have been unnecessary. The exception also demonstrates Congress's understanding that federal agencies, except under specific and narrowly defined circumstances, are subject to the FCRA's requirements. The exception expressly applies only to the notices related to "adverse actions" required by § 1681b(b)(3), and thus does not excuse federal agencies from § 1681b(b)(2)'s requirement of notice and consent before obtaining a consumer report for employment purposes. And, even in the context of sensitive national-security investigations where the exception applies, Congress carefully enumerated the reasons sufficient to justify withholding disclosure, and required agencies to provide the disclosure as soon as the investigation is complete or secrecy is no longer required. *Id.* § 1681b(b)(2).

Congress has exhibited a similar understanding in statutes related to the FCRA that share its definition of

"person." The Truth in Lending Act (TILA), 15 U.S.C. § 1601, and the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691, were both enacted around the same time as the FCRA and codified as part of the Consumer Credit Protection Act.[2] TILA imposes liability for actual damages and other forms of relief on "any creditor" violating the statute's requirements. 15 U.S.C. § 1640. The statute defines "creditor" as a "person" who extends credit under defined circumstances, and defines "person"—like the FCRA—to include any "government or governmental subdivision or agency." *See* 15 U.S.C. § 1602(d), (e) (defining "person" to include an "organization," and "organization" to include the enumerated government entities). Unlike the FCRA, however, TILA includes an express preservation of governmental immunity, providing that "[n]o civil or criminal penalty provided under this subchapter for any violation thereof may be imposed upon the United States or any department or agency thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision." 15 U.S.C. § 1612.

Similarly, the ECOA imposes liability for actual damages on "[a]ny creditor" who violates the law's prohibitions. 15 U.S.C. § 1691e(a). The law defines "creditor" to include "any person," and again defines "person" to include a "government or governmental subdivision or agency." 15 U.S.C. § 1691a(e), (f). Examining this language, the Fifth Circuit held that the statutory defini-

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[2] Congress originally enacted the FCRA in 1970 as Title IV of the Consumer Credit Protection Act. *See* Pub. L. No. 91-508, 84 Stat. 1134. TILA (Title I of the Act) was enacted two years earlier, in 1968, *see* Pub. L. No. 90-321, 82 Stat. 146; and the ECOA (Title VI), four years later, in 1974, *see* Pub. L. No. 93-495, 88 Stat. 1521.

tions "unequivocally expresse[d] Congress' intention[]" that "governmental entities are liable [for actual damages] under the Act." *Moore*, 55 F.3d at 994. In contrast, the ECOA's provision for *punitive* damages, set forth in the following paragraph, applies to "[a]ny creditor, *other than a government or governmental subdivision or agency*." 15 U.S.C. § 1691e(b) (emphasis added). Thus, the ECOA's plain language subjects government entities to liability for actual, but not punitive damages.

Congress's selective exclusion of government entities from liability under TILA and the ECOA demonstrates its awareness that, without the exclusions, those entities would have been subject to liability under statutory definitions of "person" identical to the FCRA's. *See Moore*, 55 F.3d at 994 ("Congress ... would not have specifically preserved the United States' immunity unless it believed that such immunity had been previously waived."); *see also U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 619 (1992) (holding that the Clean Water Act's definition of "person" to include government entities was overridden by express limitations in the statute's liability provisions).

2. There Is No Evidence that Congress Intended to Exclude the United States from the FCRA's Definition of "Person."

The government does not articulate an alternative interpretation of the FCRA's definition of "person" that would exclude the federal government, and, in fact, acknowledges that the term includes the United States at least "in some FCRA contexts." *See* U.S. Br. 40-41. Yet it asks this Court, in construing the statute's liability provisions, to set aside Congress's definition in favor of the word's "ordinary meaning." U.S. Br. 46. The government cites a number of authorities that define the

word "person" to exclude government entities. *Id.* None of those authorities, however, addresses a statutory definition that expressly defined "person" to include the "government." When, as here, a statute includes an explicit definition, a court "must follow that definition, *even if it varies from that term's ordinary meaning.*" *Stenberg v. Carhart*, 530 U.S. 914, 942-43 (2000) (emphasis added); *see also W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945) ("Of course, statutory definitions of terms used therein prevail over colloquial meanings."). Indeed, "[t]here would be little use" in a statutory definition if courts were free "to choose a meaning for [themselves]." *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935).

The government identifies four "factors" that it claims indicate that Congress did not intend the FCRA's definition of "person" to apply to the 1996 amendments. None of these factors provides a basis for setting aside the statute's express language.

A. The government first contends that Congress could not have intended the FCRA's 1996 amendments to impose monetary liability on the states, given that this Court had decided "mere months" earlier in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that Congress lacked authority under its Commerce Clause power to abrogate a state's sovereign immunity. U.S. Br. 47. The chronology of the FCRA's enactment, however, contradicts the government's point. While it is true that the 1996 amendments did not become law until shortly after this Court decided *Seminole Tribe*, the relevant portion of the amendments, which expanded the FCRA's liability provisions to cover any "person," was included in separate House and Senate bills passed in 1994, more than two years *before Seminole Tribe*. *See* S. Rep. No. 783, 103d Cong. (1994) (passed by a Senate vote on May 4,

1994); H.R. Rep. No. 1015, 103d Cong. (1994) (passed by a House vote on June 13, 1994). The government is thus simply mistaken when it characterizes the amendments as a "response" to *Seminole Tribe*.

Moreover, whether or not Congress believed that it lacked authority to abrogate state sovereign immunity under the FCRA, this "factor" does not suggest that Congress intended a definition of "person" other than the one set forth in the statute. Assuming that Congress lacks that authority, states could nonetheless waive their *own* immunity—either generally or in specific cases—and consent to suit on FCRA claims. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (holding that a provision of the Lanham Act imposing liability on states could not abrogate the states' sovereign immunity, but noting that states could waive their immunity to those claims). Moreover, that states may be entitled to invoke sovereign immunity for FCRA claims does not justify reading *other* government entities out of the statutory definition. Even setting aside states, the FCRA's definition of "person" to include any "government" would, in the 1996 liability provisions, still encompass the United States, as well as political subdivisions like counties and municipalities that are not entitled to Eleventh Amendment immunity. *See N. Ins. Co. of N.Y. v. Chatham Cnty.*, 547 U.S. 189 (2006).

B. The government next argues that FCRA amendments in the 1996 Intelligence Authorization Act demonstrate that Congress understood how to expressly impose liability on the federal government when it wished to do so. *See* 15 U.S.C. § 1681u. Section 1681u grants the FBI authority to obtain consumer information, under limited circumstances, for national security purposes. *Id.* In that context, the section's liability provision is de-

signed only to provide a remedy for government abuse of the specified authority. The section's express reference to federal agencies, which *limits* the scope of liability under the section, does not suggest that governments are excluded from liability provisions that Congress applied to *any* "person" under the Act.

C. The government argues that applying the statutory definition of "person" would conflict with the purpose of the Privacy Act, 5 U.S.C. 552a, to limit government liability for privacy violations. Broad conceptions of statutory purpose are a questionable guide even when interpreting a single statute. *See Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986). And Congress's purpose in enacting a *different* statute is surely irrelevant to construction of the FCRA. *See Doe v. Chao*, 540 U.S. 614, 626 (2004) (rejecting "reliance on the legislative histories of completely separate statutes"); *see also Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008) (holding that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination"). Although the subject matters of the FCRA and the Privacy Act have some overlap, the statutes were enacted at different times, cover different subjects, and coexist without need for judicial modification. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). In any case, because the FCRA unambiguously subjects the United States to liability, there is no basis for turning to another statute for guidance. *See Greenport Basin & Constr. Co. v. United States*, 260 U.S. 512 (1923).

D. Finally, the government argues that if Congress had intended to impose liability on the United States, that intent should be evident from the statute's legislative history. The "theory of the dog that did not bark" on which the government relies, however, is a weak guide to statutory interpretation. *See Harrison*, 446 U.S. at 592. This Court does not require Congress to state its understanding of a statute's plain language. As the Court has explained, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Id.* at 592; *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385, n.2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning").

In those cases where the Court has relied on an absence of legislative history, it has done so to establish that Congress intended to *retain* a statute's established meaning. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004) (finding "scant indication" that Congress intended to limit the scope of an existing provision); *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (expressing doubt that Congress "withdrew, without comment, an important category of elections" from the statute's protection); *Church of Scientology v. IRS*, 484 U.S. 9 (1987) (holding that an amendment to the Internal Revenue Code did not exclude redacted material from the statutory definition of "return information"). The government here, however, invokes congressional silence for the opposite purpose—to show that Congress intended its 1996 amendments to adopt a definition of "person" *different* from the existing statutory meaning. Whatever its legitimacy for other purposes, "mere silence in the

legislative history cannot justify" reading new elements into a statute's plain text. *Whitfield v. United States*, 543 U.S. 209, 216 (2005).

II. The FCRA Does Not Demonstrate Congress's Intent to Withdraw the Tucker Acts' Waiver.

Because the FCRA is an "Act of Congress" providing for money damages against the government, the Tucker Acts' waiver of sovereign immunity applies "unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *E. Enterprises v. Apfel*, 524 U.S. 498, 520 (1998). A repeal of the Tucker Acts' grant of jurisdiction is disfavored. *Id.* Thus, "a Tucker Act remedy exists unless there are unambiguous indications to the contrary." *Preseault v. I.C.C.*, 494 U.S. 1, 13 (1990); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-19 (1984); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 126-36 (1974).

The government advances two arguments for its conclusion that Congress did not intend the Tucker Acts' remedy to apply to FCRA claims. First, the government argues broadly that Congress did not intend the Tucker Acts to apply to *any* statute that provides its own "remedial scheme." U.S. Br. 10. In the alternative, the government argues that, even if some remedial statutes fall within the scope of the Tucker Acts' waiver, specific features of the FCRA render it incompatible with the Tucker Acts. Neither of the government's arguments, however, provides any evidence that Congress intended to withdraw FCRA claims from the Tucker Acts' jurisdiction.

A. The government first argues that "Congress would not ... have intended a Tucker Act remedy for statutes" that already provide their own "statutory judicial remedy." U.S. Br. 20. According to the government,

Congress intended the Tucker Acts to provide a "fully formed remedial scheme" that takes effect only when a statute does not provide a "judicial damages remedy" of its own. *Id.* at 10. As the government acknowledges, however, the Tucker Acts' plain language contains no exception for remedial statutes. U.S. Br. 20. Rather, the Acts provide jurisdiction over claims under "*any* Act of Congress." 28 U.S.C. § 1346(a)(2) (emphasis added); 28 U.S.C. § 1491(a)(1).

The cases on which the government relies also fail to support its contention that the Tucker Acts' jurisdiction excludes remedial statutes. Those cases involved statutes that unambiguously demonstrated Congress's intent "to preclude judicial review" of particular claims. *United States v. Fausto*, 484 U.S. 439, 443-44 (1988). As in those cases, Congress has in limited circumstances "withdrawn the Tucker Acts' grant of jurisdiction" through subsequently enacted legislation. *Preseault*, 494 U.S. at 12. But this Court does not "presume" that subsequent legislation "worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed." *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (internal quotation marks omitted). In *Fausto*, for example, this Court held that the Tucker Acts did not waive sovereign immunity for claims under the Back Pay Act. 484 U.S. 439. The Court relied on another statute—the Civil Service Reform Act—in which Congress had "deliberate[ly] excluded ... employees in respondent's service category" from entitlement to such relief. *Id.* at 455. To nevertheless allow the claims to proceed under the Tucker Act, the Court concluded, would allow employees to circumvent the limitations on remedies that Congress intended. *Id.*

The other cases cited by the government also relied on Congress' intent to limit particular claims. In *Hinck v. United States*, the Court held that a limited statutory remedy adopted "against a backdrop of decisions uniformly rejecting the possibility of any review" demonstrated Congress's intent to establish exclusive jurisdiction in the Tax Court. 550 U.S. 501, 506 (2007). Similarly, *Brown v. General Services Administration* held that Title VII withdrew the Tucker Acts' grant of jurisdiction by "unambiguous[ly]" demonstrating Congress's intent to "create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." 425 U.S. 820, 834 (1976). And in *Nichols v. United States*, this Court held that permitting jurisdiction in the Court of Claims would have allowed the plaintiff to bypass a statute requiring payment of duties under protest before filing suit. 74 U.S. 122 (1868); *see also United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982) (holding that "Congress deliberately intended to foreclose" a Tucker Act remedy).

In contrast, the government identifies no statutory limits common to all "remedial statutes" that the Tucker Acts would allow parties to evade. The government argues only that bringing FCRA claims under the Tucker Acts would allow parties to rely on substantive claims for damages under the FCRA "while invoking the Tucker Act to remove any sovereign-immunity limitation." U.S. Br. 25. That, however, is precisely the function that the Tucker Acts are *supposed* to serve. As this Court has explained, the Tucker Acts do not themselves "create substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on *other* sources of law (e.g., statutes or contracts)." *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (emphasis added); *see also Mitchell II*,

463 U.S. at 216-217, 218 (holding that the Tucker Acts do not "create any substantive right," and that a damages claim against the United States must be grounded on some other "source of substantive law"). Far from excluding "independent remedial schemes" from their scope, the Tucker Acts thus *require* "specific rights-creating or duty-imposing statutory or regulatory prescriptions" for their waiver to apply. *Navajo Nation*, 556 U.S. at 506.

The government's argument that the Tucker Acts would allow plaintiffs to circumvent sovereign-immunity limits is particularly misplaced when applied to FCRA claims. Far from expressing an "unambiguous intention to withdraw the Tucker Act remedy," *Preseault*, 494 U.S. at 12, the FCRA provides a cause of action for damages against the "government." To accept the government's position that remedial statutes fall outside the Tucker Acts' scope would lead to the paradoxical result that Congress, by expressly creating a damages claim against the government, succeeded only in eliminating the means for obtaining those damages. Nothing in the Tucker Acts' text or this Court's decisions supports that illogical result.

B. In the alternative, the government argues that, even assuming that the Tucker Acts are capable of waiving sovereign immunity for remedial statutes, specific features of the FCRA render it incompatible with the Tucker Acts' waiver. U.S. Br. 30. None of the features of the FCRA on which the government relies, however, demonstrates an incompatibility with the Tucker Acts, or even distinguishes the FCRA from any other typical federal statutory cause of action.

First, the FCRA's grant of jurisdiction to federal district courts is merely an application of the default rule

that the district courts have jurisdiction over "all civil actions arising under the ... laws ... of the United States." 28 U.S.C. § 1331. Because district court jurisdiction is always available over causes of action arising under federal statutes, to hold that such jurisdiction conflicts with the Tucker Acts would entirely eliminate statutory causes of action from the Acts' jurisdiction.

Fortunately, there is no such conflict. On the contrary, the Little Tucker Act itself provides jurisdiction in the district courts for claims of $10,000 or less. And although the general Tucker Act, on its face, grants jurisdiction only to the Court of Federal Claims, Congress's grant of jurisdiction to one court does not withdraw jurisdiction from another unless Congress specifies that the grant is exclusive. *See Mims v. Arrow Fin. Servs.*, 132 S. Ct. 740, 749 (2012). As this Court has recognized, the Tucker Acts' grant of jurisdiction to the Court of Federal Claims does not expressly oust the district courts of their concurrent federal-question jurisdiction under § 1331. *See Bowen v. Massachusetts*, 487 U.S. 879, 891 & nn. 15-16, 910 (1988). Jurisdiction in the district courts thus remains available for all Tucker Act claims.

To be sure, the general Tucker Act limits its waiver of sovereign immunity to actions filed in the Court of Federal Claims, thus requiring plaintiffs—as a practical matter—to file there when seeking more than the Little Tucker Act's limit of $10,000. But nothing prevents FCRA plaintiffs from filing such cases in the Court of Federal Claims. The FCRA does not provide that district court jurisdiction is exclusive, but that a claim may be brought in the district courts "*or in any other court of competent jurisdiction.*" 15 U.S.C. § 1681p; *see Baird v. United States*, 71. Fed. Cl. 536, 541 n.10 (2006) ("The FCRA does not appear ... to limit jurisdiction to the Dis-

trict Courts and State courts."). Jurisdiction over damages claims against the government under the FCRA and the Tucker Acts is thus coextensive: plaintiffs may file in district court, but are limited to the Court of Federal Claims if they wish to recover more than $10,000.

The government responds to this point by asserting that "[t]here is no evidence" that Congress believed the Court of Federal Claims to be a "court of competent jurisdiction" under the FCRA's jurisdictional provision. U.S. Br. 36. But that argument misses the point. It is the government's burden to show that Congress in the FCRA unambiguously withdrew the Tucker Acts' remedies. *See Preseault*, 494 U.S. at 13. The FCRA's permissive grant of jurisdiction to district and unspecified "other" courts does not create the sort of "exclusive ... judicial scheme" that this Court has found sufficient to satisfy that burden. *Brown*, 425 U.S. at 834. Indeed, even where Congress has directed claims to a special court, this Court has held that the Tucker Acts' remedies remain available. *See Regional Rail Reorg. Act Cases*, 419 U.S. 102 at 126-36 (holding that Congress's provision for a special three-judge district court did not conflict with the Tucker Acts' remedies). If a provision for a special three-judge court is not inconsistent with the Tucker Acts, the FCRA's unremarkable jurisdictional provision is surely not inconsistent either.

Second, as the Federal Circuit below recognized, the FCRA's provision for punitive damages does not conflict with the Tucker Acts. Pet. App. 14a-15a. If punitive damages cannot be imposed on the government under the Tucker Acts, as the Federal Circuit held, it would mean only that plaintiffs in cases under the Tucker Acts would be limited to claims for actual damages. It would

not suggest, however, that Congress intended to deny *all* remedies under the FCRA.

Third, the government argues that the FCRA's two-year statute of limitations conflicts with the default six-year limitations period for Tucker Act claims set forth in 28 U.S.C. § 2501. Once again, the government's argument, if correct, would mean that the Tucker Act conflicts with nearly every cause of action arising under federal law. Limitations periods are widespread among federal statutes, and even statutes lacking such provisions are subject to a default limitations period of four years. *See* 28 U.S.C. § 1658(a) ("Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.").

The Tucker Acts' waiver of immunity, however, is not limited to causes of action with six-year limitations periods. As this Court has explained, Congress intended the Tucker Acts' six-year limit "merely to place an outside limit on the period within which all suits might be initiated," leaving Congress free to "provide less liberally for particular actions which, because of special considerations, required different treatment." *United States v. A.S. Kreider Co.*, 313 U.S. 443 (1941). When a statute provides a shorter period, as the FCRA does here, the shorter period governs. *See United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 8 (2008). Thus, the FCRA's two-year period could not possibly indicate Congress's clear intent to withdraw the Tucker Acts' remedy.

III. FCRA Actions Do Not Fall Within the Tucker Acts' Exclusion of Claims "Sounding in Tort."

The government argues that claims under the FCRA "sound[] in tort" and are thus expressly excluded from the Tucker Acts' scope. Statutory claims, however, are not covered by the Tucker Acts' tort exclusion, and, in any event, an FCRA claim does not sound in tort.

A. Under the Tucker Acts' express language, jurisdiction over a claim based on an "Act of Congress" does not depend on whether the claim "sound[s] in tort." The Tucker Acts set forth five categories of claims for which Congress waived sovereign immunity: claims "founded *either* upon [1] the Constitution, *or* [2] any Act of Congress, *or* [3] any regulation of an executive department, *or* [4] upon any express or implied contract with the United States, *or* [5] for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1346(a)(2) (emphasis added); 28 U.S.C. § 1491(a)(1); *see Dooley v. United States*, 182 U.S. 222, 224 (1901) (holding that the Tucker Acts recognize "distinct classes of cases").[3]

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[3] The distinctness of each category of claims is emphasized by a prior version of the Tucker Act, which listed each category of claim in a separately numbered paragraph:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> (1) Founded upon the Constitution; or
>
> (2) Founded upon any Act of Congress; or
>
> (3) Founded upon any regulation of an executive department; or
>
> (4) Founded upon any express or implied contract with the United States; or

(continued)

The Tucker Acts' use of the word "either" and the disjunctive "or" demonstrates that the Acts cover claims that fall within any one of the listed categories. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Because "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows," *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), the statutory exclusion for cases "sounding in tort" applies only to the final category of claims: claims for "liquidated or unliquidated damages." *See Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002). Thus, the Tucker Acts waive the government's sovereign immunity for the third category of claims—claims under "*any* ... Act of Congress"—regardless of whether the claims "sound[] in tort." 28 U.S.C. 1346(a)(2) (emphasis added); 28 U.S.C. § 1491(a)(1).[4]

Despite some early uncertainty, this Court ultimately concluded, consistent with the Tucker Acts' plain language, that the tort exclusion does not apply to federal

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(5) For liquidated or unliquidated damages in cases not sounding in tort.

Act of June 25, 1948, ch. 646, § 1, 62 Stat. 940 (1948).

[4] The Tucker Acts' grant of jurisdiction over claims for "liquidated or unliquidated damages in cases not sounding in tort" covers common-law claims (i.e., claims not founded on the Constitution, statutes, or regulations) that are based in neither contract nor tort. The provision is rarely invoked, and has been described by the Court of Claims as a "still-amorphous and unfamiliar part of our jurisdiction." *Eastport S. S. Corp. v. U.S.*, 372 F.2d 1002, 1013 (Ct. Cl. 1967). This Court applied the provision in *United States v. Cornell Steamboat Co.* to find jurisdiction over a claim for salvage. 202 U.S. 184, 190 (1906) (holding that a salvage claim can "properly be said to be one for unliquidated damages in a case not sounding in tort").

statutory or constitutional claims. Before 1933, the Court articulated contradictory interpretations of the exclusion. *See* Charles C. Binney, *The Element of Tort As Affecting the Legal Liability of the United States*, 20 Yale L.J. 95, 100 (1910) (surveying early cases). In some cases, the Court held that the Tucker Acts grant jurisdiction over claims founded on the Constitution or federal statute, regardless of whether the claim is a tort. In *Dooley v. United States*, for example, the Court held that "[t]he words 'not sounding in tort' ... refer[] only to the [final] class of cases"—i.e., actions for "liquidated or unliquidated damages." 182 U.S. at 224. Thus, the Court concluded that claims founded on federal statutes, "whether ... tortious or not," fell within the "class of cases specified in the Tucker act, of claims founded upon a law of Congress." *Id.*

In other cases, the Court adopted the opposite interpretation, holding that the tort exclusion applied to all categories of claims recognized by the Tucker Acts. *See, e.g.*, *Schillinger v. United States*, 155 U.S. 163 (1894). The Court in *Schillinger* relied on a line of cases, originating before the Tucker Acts, holding that the Court of Claims lacked jurisdiction over "claims against the government for mere torts," and thus that "[s]ome element of contractual liability must lie at the foundation of every action." *Id.* at 167. Justice Harlan, in dissent, argued that the plaintiff's patent-infringement claim was equivalent to a claim for taking under the Fifth Amendment, and was thus "founded upon the constitution of the United States ... even if the appropriation had its origin in tort." *Id.* at 179. The majority, however, read the Tucker Acts' tort exclusion, "even if qualifying only the clause immediately preceding," as an endorsement of its pre-Tucker Act cases excluding non-contract claims. *Id.* at 169.

This Court resolved the controversy in a line of cases beginning with *Jacobs v. United States*, 290 U.S. 13, 27 (1933). There, the Court held—directly contrary to *Schillinger*—that the Tucker Acts' grant of jurisdiction for claims "founded on the Constitution" includes claims under the Fifth Amendment, without regard to whether the claims sound in contract or tort. *Id.* The Court reaffirmed that holding in *United States v. Causby*, concluding again that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." 328 U.S. 256, 267 (1946); *see* Justin Torres, *The Government Giveth, and the Government Taketh Away: Patents, Takings, and 28 U.S.C. § 1498*, 63 N.Y.U. Ann. Surv. Am. L. 315, 332 (2007) ("Taken together, *Jacobs* and *Causby* ... gutted the central holding of *Schillinger*.").

Since then, this Court has consistently interpreted the Tucker Act as granting jurisdiction over statutory and constitutional claims without first asking whether the claims constitute torts. In *Ruckelshaus v. Monsanto Co.*, for example, the Court found the Tucker Acts applicable to a claim for the government's uncompensated taking of trade secrets under the Federal Insecticide, Fungicide, and Rodenticide Act. 467 U.S. at 993. Although the Court relied on the Restatement of Torts to define trade secrets, it never suggested that the cause of action would be excluded from the Tucker Acts as "sounding in tort." *Id.*; *see also White Mountain Apache Tribe*, 537 U.S. at 472 (holding that the Tucker Acts grant "jurisdiction to award damages upon proof of 'any claim against the United States founded either upon the Constitution, or any Act of Congress'"); *Mitchell II*, 463 U.S. at 218 ("[T]here is simply no question that the Tucker Act provides the United States' consent to suit

for claims founded upon statutes or regulations that create substantive rights to money damages.").

B. Even if the Tucker Acts' tort exclusion applied to "Act[s] of Congress," the exclusion would not affect the claims here because FCRA claims do not "sound[] in tort."

The government broadly defines "tort" to include any "legal wrong committed upon the person or property independent of contract." U.S. Br. 31. The government's definition, while partly correct, is incomplete. Although it is true that a tort is a cause of action "independent of contract," that definition ignores the numerous causes of action—such as, for example, trusts—that are neither contract claims nor torts. *See* 1 Edwin A. Jaggard, *Hand-Book of the Law of Torts* 5 (1895) (defining a tort as a "wrong independent of contract ... is like a definition of a horse as a quadruped"). As treatises from around the time Congress passed the Tucker Acts recognize, not every wrong independent of contract is a tort, but only those wrongs recognized as torts at common law. *See* J. F. Clerk, *The Law of Torts* 1 (1889) ("A tort may be described as a wrong independent of contract, for which the appropriate remedy is a common law action."); Frederick Pollock, *The Law of Torts* 3 (1887) ("A tort is an act or omission giving rise, in virtue of the common law jurisdiction of the Court, to a civil remedy which is not an action of contract."); John W. Salmond, *Jurisprudence* 559 (1902) ("A tort may be defined as a civil wrong, independent of contract, for which the remedy is a common law action for damages."). Congress is presumed to know and understand these established meanings. *See Molzof v. United States*, 502 U.S. 301, 307-08 (1992).

Contemporaneous treatises also recognize statutory claims as one category of claim that sounds in neither contract nor tort. *See* W. Edmund Ball, *Principles of Torts and Contracts* 6 (1880) ("Where a statute creates a right or duty, and no remedy is expressly provided, the remedy is by action of tort. But where a specific remedy is provided in the statute, that remedy and that only can be pursued, unless it fails to cover the whole right."); Arthur Underhill, *A Summary of the Law of Torts* 20 (1873) (explaining that the breach of a statutory duty is only a tort if the statute does not "also enforce[] the duty by a penalty recoverable by the party aggrieved" (emphasis omitted)); Salmond, *Jurisprudence*, at 44 (distinguishing common law from statutory law). This Court's decisions from the era thus distinguish between "a tort at common law" and a "cause of action created by statute." *Texas & P. Ry. Co. v. Cox*, 145 U.S. 593, 604 (1892); *see also Metro. R. Co. v. Dist. of Columbia*, 132 U.S. 1, 12 (1889). Because a cause of action under the FCRA is created by statute, it is therefore necessarily not a tort.

In support of its argument that federal statutory claims constitute torts, the government relies primarily on *Schillinger*, 155 U.S. 163. There, the Court held that a patent-infringement claim "sound[ed] in tort," even though based on a federal statute. *Id.* at 169. As previously explained, *Schillinger* is based on the pre-*Jacobs* line of cases, in which the Court held the Tucker Acts' tort exclusion applicable to all categories of Tucker Act claims, and thus no longer reflects this Court's interpretation of the exclusion's scope. But even if it remained good authority, *Schillinger* would not govern this case. When *Schillinger* was decided, the Patent Act provided that damages "may be recovered by action on the case," which courts interpreted to provide a common-law claim for the tort of trespass on the case. *See* Charles Alan

Wright et al., 9 *Federal Practice & Procedure* § 2312 (3d ed. 1998).[5] *Schillinger* relied on the Patent Act's provision of "an action on the case" in concluding that "[t]he case was, *within the language of the statute*, one 'sounding in tort.'" 155 U.S. at 169 (emphasis added). Thus, *Schillinger* stands at most for the proposition that a statute falls within the tort exclusion when the statutory remedy is a common-law tort. The FCRA claim here, however, has no statutory language comparable to the Patent Act's "action on the case," and there is no common-law claim analogous to the FCRA's claim for printing credit card numbers and expiration dates.

C. The government's reading of "tort" to include federal statutory claims suffers from other problems. First, it would render the meaning of "tort" under the Tucker Acts inconsistent with the Federal Tort Claims Act, which excludes federal statutory claims. *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994). Under the government's reading, a federal statutory claim would be excluded from the Tucker Acts as a tort and, at the same time, excluded from the Federal Tort Claims Act as a non-tort. There is no basis for that distinction.

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[5] *See, e.g., Cramer v. Fry*, 68 F. 201, 205 (C.C.N.D. Cal. 1895) ("The statute says: 'That damages for the infringement of any patent may be recovered by action on the case. ... There is no obscurity as to what this means. An action on the case is a well-known action in form ex delicto."); *Pitcher v. United States*, 1863 WL 2290 (Ct. Cl. 1863) ("At common law the infringement or disturbance of a right of this kind was held to be a tort, for which an action of trespass on the case was the appropriate, if not the only, remedy at law. Under our statutes in relation to patent rights the same form of action has been prescribed."); *Shreve v. United States*, 1860 WL 4862 (Ct. Cl. 1860) ("[A]n infringement of a patent is a cause of action at the common law.").

Second, to classify all non-contractual wrongs as "torts" under the Tucker Acts, as the government urges here, would render meaningless four of the five categories of claims recognized by the Acts. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks and citations omitted). Under the government's reading of the statute, the Tucker Acts would waive sovereign immunity only for contract claims. All other categories of claims recognized by the Acts—including claims based on the Constitution, statutes, and regulations—would, as non-contractual claims, be excluded "torts." The government's reading would thus fly in the face of this Court's interpretation of the Tucker Acts as "cover[ing] not only contract claims, but also other claims for money damages 'founded either upon the Constitution, or any Act of Congress ... .'" *United States v. Hohri*, 482 U.S. 64, 72 (1987).

CONCLUSION

The decision below should be affirmed.

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REPLY BRIEF

No. 11-192

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES X. BORMES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR THE UNITED STATES

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Respondent's interpretation of the Tucker Act would turn sovereign-immunity law upside down. The established test for determining whether a statute's remedial scheme exposes the United States to damages liability looks to whether that statute contains an "unequivocal expression of elimination of sovereign immunity." *Lane* v. *Peña*, 518 U.S. 187, 192 (1996) (internal quotation marks omitted). Respondent and the Federal Circuit, however, would allow a plaintiff to avoid that clear-statement rule simply by citing the Tucker Act or Little Tucker Act in his complaint. Indeed, in respondent's view, a plaintiff who adds those few extra words to his complaint can effectively reverse the clear-statement rule, imposing a burden on the government to demonstrate that Congress has unambiguously *not* waived the United States' sovereign immunity. Br. 26-29.

That approach, which would impose enormous burdens on the public fisc, finds no support in this Court's

precedents. Neither respondent nor the court of appeals has identified a single case in which this Court has authorized a Tucker Act suit under either a statute that already contains its own remedial scheme or a statute that applies generally (rather than to the United States exclusively). The court of appeals' decision here, which crosses both of those lines at once, cannot be reconciled with this Court's consistent recognition of the Tucker Act's limitations—most importantly, that the Tucker Act is inapplicable where Congress has provided specific remedies under a particular statute.

The Federal Circuit's threshold error of applying the Tucker Act to the native civil-remedies provisions of the Fair Credit Reporting Act (FCRA) alone requires vacatur of its decision. But even assuming that initial step were defensible, the court of appeals' decision contains other, independent errors as well. It disregards the Tucker Acts' express limitation to "cases not sounding in tort," 28 U.S.C. 1346(a)(2), 1491(a)(1) (Supp. IV 2010); it contrives an ad hoc remedy that resembles neither a normal FCRA suit nor a normal Tucker Act suit; and it opens the door to a potentially dramatic expansion of federal liability that Congress did not intend.

I. THE TUCKER ACTS DO NOT APPLY TO STATUTES WITH SELF-CONTAINED REMEDIAL SCHEMES

When Congress designed FCRA's general civil-remedies provisions, 15 U.S.C. 1681n (Supp. IV 2010) and 15 U.S.C. 1681*o*, it either intended that those provisions impose damages liability on the United States or it did not. The answer to that question of congressional intent lies in an examination of whether Sections 1681n and 1681*o* themselves clearly encompass suits against the United

States. See *Lane*, 518 U.S. at 192. The answer does not lie in the Tucker Acts.

1. As the government's opening brief explains (at 17-30), the Tucker Acts' function is to provide an autonomous remedial scheme in certain situations where Congress has not otherwise addressed questions of remedy. Congress did not intend them, and this Court has not applied them, as an interpretive rule for determining whether the United States can be sued under a statute's own native remedial provisions. Rather, this Court's cases have consistently recognized that if Congress enacts a statute with its own complete remedial scheme, and does not provide a statutory remedy for certain types of claims against the United States, a claimant may not resort to the Tucker Acts to expand the remedies available. See U.S. Br. 20-23; *Hinck* v. *United States*, 550 U.S. 501, 506-507 (2007); *United States* v. *Fausto*, 484 U.S. 439, 448 (1988); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982); *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 834 (1976); *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122, 131 (1869); see also *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 740-741 (1982); *United States* v. *Testan*, 424 U.S. 392, 403-404 (1976).

Respondent never directly engages with that doctrine, let alone explains why it does not apply in the context of FCRA. He instead tries (Br. 26-27) to recast the precedents cited by the government as a series of one-off cases involving special statutes uniquely preclusive of a Tucker Act remedy. But that pointillistic approach to this Court's decisions overlooks their common theme: "the well-established principle that, in most contexts, a precisely drawn, detailed statute pre-empts more general remedies." *Hinck*, 550 U.S. at 506 (internal quotation marks and citation omitted); *Fausto*, 484 U.S. at 448 (1988) (relying on

"comprehensive nature" of statute and absence of a statutory remedy for certain employees); *Erika, Inc.*, 456 U.S. at 208 (relying on statute's "precisely drawn provisions" and omission of a remedy for certain types of claims); *Brown*, 425 U.S. at 834 (relying on the principle that "a precisely drawn, detailed statute pre-empts more general remedies"); *Nichols*, 74 U.S. (7 Wall.) at 131 (relying on limitations placed on remedies when Congress "carefully constructed a revenue system"); see also *Sheehan*, 456 U.S. at 740-741 (noting that "Congress' intent to prohibit a backpay claim by a Service employee would obviously be subverted if the employee could sue under the Tucker Act whenever he asserted a violation of the Service's regulations governing termination"); *Testan*, 424 U.S. at 404 (noting that if respondents' claim were to proceed, "many of the federal statutes—such as the Back Pay Act—that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous").

That principle applies with full force here. This Court has long presumed "congressional familiarity" with the "common rule" that "any waiver of the National Government's sovereign immunity must be unequivocal." *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992). Under that clear-statement rule, Congress can be confident that its enactment of a generally applicable remedial scheme will have no impact on the federal Treasury unless it has specifically considered and plainly consented to that result. See *Lane*, 518 U.S. at 190-200 (no governmental liability under Section 504(a) of the Rehabilitation Act of 1973); see also *United States Dep't of Energy*, 503 U.S. at 619-620 (no governmental liability for punitive fines under the Clean Water Act).

But that confidence necessarily depends upon the specific-governs-the-general principle. Without it, the enactment of any new remedial scheme could potentially give rise to damages actions against the United States whether or not Congress intended them (or even thought about them). All a plaintiff would need to do is cite one of the Tucker Acts and his burden to establish governmental liability would reduce from a clear-statement rule to a fair-interpretation rule. Pet. App. 7a. The ease of that maneuver would subvert the main purpose of the clear-statement rule: assuring that Congress has in fact focused on the specific issue and exercised its exclusive constitutional prerogative to permit suit against the United States. See *OPM* v. *Richmond*, 496 U.S. 414, 425 (1990) (observing that the powers of the Executive and Judicial Branches are "limited by a valid reservation of congressional control over funds in the Treasury"); see also *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001) ("In traditionally sensitive areas, . . . the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (brackets and citation omitted). And under respondent's approach, the Federal Circuit would have license to interpret even ambiguous statutes, including ones that this Court has found not to satisfy the clear-statement rule, to impose monetary liability on the United States.

2. Respondent asserts (Br. 28) that this "is precisely the function that the Tucker Acts are *supposed* to serve." But he identifies not a single case applying them that way. The cases he cites to support his assertion—*United States* v. *Navajo Nation*, 556 U.S. 287, 290 (2009), and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)—applied the Tucker Act's fair-interpretation frame-

work in the very different context of statutes that are *not* generally applicable and did *not* contain their own remedial schemes. See *Navajo Nation*, 556 U.S. at 295 (statutes regulating relationship between United States and Indian tribes); *Mitchell II*, 463 U.S. at 226 (same). As the United States explains in its opening brief (at 26-27), and respondent nowhere disputes, this Court has *never* applied the fair-interpretation framework to hold the government liable under a generally applicable remedial scheme like FCRA's.

In arguing that the Court should do so for the first time here, respondent relies on two critically flawed premises. First, like the court of appeals (Pet. App. 7a), he would apply the fair-interpretation test to each and every federal statute. This Court, however, has repeatedly turned back Tucker Act claims on threshold specific-governs-the-general grounds without ever reaching the fair-interpretation test. See U.S. Br. 22-23; *id.* at 26 (discussing the fair-interpretation arguments raised, but never considered, in *Hinck* and *Erika, Inc.*).

Second, respondent would take the further step of shifting the burden to the United States to "unambiguously" prove "Congress's clear intent to *withdraw* the Tucker Acts' remedy" any time the Federal Circuit deemed the watered-down fair-inference test to be satisfied. Br. 9 (emphasis added); see *id.* at 26-32. That proposal would effectively reverse the normal clear-statement rule, and make damages remedies against the United States the norm rather than the exception. The cases cited by respondent (*id.* at 26) do not support such an approach.

None of those cases involved, as this case does, the question whether the Tucker Act provides a remedy for the violation of a statute. Instead, each of those cases considered the question whether the Tucker Act provided

a mechanism for recovering a money judgment as just compensation for a taking of property under the Fifth Amendment. See *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 519-522 (1998) (plurality opinion); *Preseault* v. *ICC*, 494 U.S. 1, 11-19 (1990); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1019 (1984); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 125-136 (1974). This Court has long recognized that plaintiffs may bring such takings claims under the Tucker Act. See, *e.g.*, *United States* v. *Causby*, 328 U.S. 256, 267 (1946). The cases cited by respondent have therefore presumed that Congress intends to allow such claims, unless the statute authorizing the taking, or the nature of the claim, indicates otherwise. *Preseault*, 494 U.S. at 12; see *Eastern Enters.*, 524 U.S. at 520 (plurality opinion); *Monsanto Co.*, 467 U.S. at 1017; *Regional Rail Reorg. Act Cases*, 419 U.S. at 126; compare *Eastern Enters.*, 524 U.S. at 521-522 (plurality opinion) (finding no compensatory remedy and citing, *inter alia*, *Babbitt* v. *Youpee*, 519 U.S. 234 (1997), and *Hodel* v. *Irving*, 481 U.S. 704 (1987)).

Unlike those cases, this one involves neither the Just Compensation Clause nor an argument that a statute "withdraws" a Tucker Act remedy that this Court has long recognized. Respondent seeks not to preserve a Tucker Act remedy approved by this Court's precedents, but instead to expand the Tucker Act well beyond those precedents to permit damages actions against the United States under a statutory remedial scheme of general applicability. That novel argument contravenes the specific-governs-the-general principle; would undermine this Court's sovereign-immunity jurisprudence (and Congress's reliance upon it); and should be rejected.

II. RESPONDENT'S PROPOSED REMEDY IS AT ODDS WITH BOTH THE TUCKER ACTS AND FCRA

Even assuming the Tucker Acts' fair-inference rule could supplant the clear-statement rule for determining whether a statute's self-contained remedial scheme permits suits for money damages against the United States, conflicts between FCRA and the Tucker Acts preclude a Tucker Act remedy here. U.S. Br. 30-40. In attempting to fit the square peg of FCRA's remedial scheme into the round hole of the Tucker Acts, respondent and the court of appeals jury-rig a remedy that neither statute authorizes and that Congress would never have envisioned. See *ibid.*

1. First and foremost, permitting FCRA claims under the Tucker Acts flouts the Tucker Acts' limitation to "cases not sounding in tort." U.S. Br. 30-33. Respondent seeks to avoid that limitation by arguing that it applies only to claims for "liquidated or unliquidated damages" and that the definition of "tort" in the Tucker Acts should be much narrower than the one provided in *Black's Law Dictionary* around the time they were enacted. Br. 33-40. Those arguments lack merit.

As a threshold matter, because "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign," *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999), "[a]ny ambiguities" in the Tucker Acts' not-sounding-in-tort limitation must be resolved "in favor of immunity," *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012). Respondent fails to demonstrate that his interpretations are correct, let alone unambiguously so.

As respondent acknowledges (Br. 35), this Court recognized in *Schillinger* v. *United States*, 155 U.S. 163 (1894), that the not-sounding-in-tort limitation "even if qualifying only the clause immediately preceding, and not

extending to the entire grant of jurisdiction found in the section, is a clear endorsement of the frequent ruling of this court that cases sounding tort are not cognizable in the Court of Claims." *Id.* at 169. "[S]ome element of contractual liability," the Court explained, "must lie at the foundation of every action." *Id.* at 167. Because respondent has never even tried to show that an "element of contractual liability" underlies his FCRA suit here, that suit is not cognizable under the Tucker Acts.

Respondent's argument that *Schillinger* is no longer good law (Br. 33-37) is misguided. The only case he cites that does anything but approvingly refer to *Schillinger* in passing is *Dooley* v. *United States*, 182 U.S. 222 (1901) (cited at Resp. Br. 33). And while some statements in *Dooley* could be read to cast doubt on *Schillinger*, this Court has expressly held that *Dooley* "did not overrule *Schillinger*." *Basso* v. *United States*, 239 U.S. 602, 606 (1916). Even after *Dooley*, the Court has continued to rely on *Schillinger* to dismiss claims that sound in tort. See *id.* at 606-608 (rejecting claim asserted to be "founded upon the Constitution" because it sounded in tort); see also *United States* v. *Nederlandsch-Amerikaansche Stoomvart Maatschappij*, 254 U.S. 148, 152-155 (1920) (same); cf. *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723, 1729 (2011) (describing Tucker Act as a waiver for "non-tort claims").

Nor did the Court silently overrule *Schillinger* in *Jacobs* v. *United States*, 290 U.S. 13 (1933), or *United States* v. *Causby*, *supra*, neither of which even mentions *Schillinger*. The "only question before" the Court in *Jacobs* was whether interest was allowable on a particular Tucker Act claim under the Just Compensation Clause. 290 U.S. at 16. *Causby* likewise involved a claim under the Just Compensation Clause. 328 U.S. at 258; see also *Monsanto*

Co., 467 U.S. at 1016-1019 (same) (cited at Resp. Br. 36). This Court's recognition of a Tucker Act remedy for a Just Compensation Clause violation does not suggest that the Tucker Acts' not-sounding-in-tort exception is inapplicable to statutory and constitutional claims. To the contrary, as cases cited in *Causby* illustrate, the Court has long understood that the Just Compensation Clause creates an implied contract to pay in the event of a taking. See 328 U.S. at 267; *Yearsley* v. *W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940) (noting that for "a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims"); *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932) (noting that if a taking occurs, "the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract"); *Hollister* v. *Benedict & Burnham Mfg. Co.*, 113 U.S. 59, 67 (1885) (noting that "the law would imply a promise of compensation" in an eminent-domain case); see also *Jacobs*, 290 U.S. at 16 ("A promise to pay * * * was implied because of the duty to pay imposed by the Amendment.").

The only other cases respondent cites (see Br. 36-37) for the proposition that this Court will infer a Tucker Act remedy without inquiring into the nature of the claim involved statutes imposing trust-law duties on the United States. See *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472, 474-476 (2003); *Mitchell II*, 463 U.S. at 224-228. A breach-of-trust claim, however, does not sound in tort. See John W. Salmond, *Jurisprudence* § 169, at 435 (2d ed. 1907) ("A tort may be defined as a civil wrong, for which the remedy is an action for damages, and which is not solely a breach of contract or a breach of trust.");

1 Edwin A. Jaggard, *Hand-Book of the Law of Torts* 5 (1895) ("A breach of trust, adultery, or the refusal to pay just compensation for a relief to a vessel in distress are wrongs; but none of them are torts."). Indeed, although it has not always been recognized as such, trust law can be considered a close relative of contract law. See generally John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625 (1995); see also, *e.g.*, Fredric W. Maitland, *Equity also the Forms of Action at Common Law: Two Courses of Lectures* 115 (A.H. Chaytor & W.J. Whittaker eds., 1st ed. 1909) ("[The] trust was originally regarded as an obligation, in point of fact a contract though not usually so called.").

Because constitutional provisions and statutes thus sometimes impose obligations "not sounding in tort," respondent errs in asserting (Br. 40) that the government's position would inflexibly foreclose Tucker Act claims based on those sources of law. Respondent himself, however, would define the term "tort" so narrowly that the not-sounding-in-tort limitation could *never* apply to "statutory claims." *Id.* at 37-39. Contrary to respondent's suggestion (*id.* at 39), the Federal Tort Claims Act, which does not even use the word "tort" in its operative text, does not support that narrow definition. See U.S. Br. 33; 28 U.S.C. 1346(b)(1). And the definition cannot be squared with *Schillinger*'s recognition that a statute providing "for the recovery of damages for the infringement of a patent" was a "tort" for Tucker Act purposes. 155 U.S. at 169; see Rev. Stat. § 4919 (1878); U.S. Br. 32-33.

Respondent points out (Br. 38-39) that the statute at issue in *Schillinger* used a common-law term ("action on the case") to describe the damages action it created. But that particular damages action was still "created by statute." Resp. Br. 39. Respondent's suggestion that the

statute in *Schillinger* created a common-law claim is nonsensical. The definitions of "statutory law" and "common law" are mutually exclusive. See *Black's Law Dictionary* 313 (9th ed. 2009) (defining "common law" as the "body of law derived from judicial decisions, rather than from statutes or constitutions"); *id.* at 1547 (defining "statutory law" as the "body of law derived from statutes rather than from constitutions or judicial decisions"). Moreover, respondent's suggestion would apply equally to FCRA's general civil-remedies provisions, which define causes of action by reference to the common-law concepts of willfulness and negligence. See 15 U.S.C. 1681n (Supp. IV 2010); 15 U.S.C. 1681*o*; see, *e.g.*, *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 58, 68-69 (2007) (looking to common law to define "willfully" in Section 1681n).

In any event, tort treatises around the time of the Tucker Act's enactment (including one cited by respondent himself) recognized that statutory claims can be torts. See 1 Jaggard 348 ("Remedies for torts may be either * * * (a) *Statutory*; or (b) Common-law") (emphasis added); Resp. Br. 37 (citing that treatise); see also Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 650-658 (1880) (discussing tort claims based on statutes); see also *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring in part and concurring in the judgment) (relying on Cooley's treatise, which "tracked Blackstone's view," to conclude that "the cause of action created by [42 U.S.C. 1983] is, and was always recognized as, a tort claim"). This Court has itself similarly recognized that statutory causes of action may "sound in tort." See *City of Monterey*, 526 U.S. at 709 ("[T]here can be no doubt that [42 U.S.C. 1983] claims sound in tort."); *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974)

("A damages action under the [Fair Housing Act] sounds basically in tort."); *Labine* v. *Vincent*, 401 U.S. 532, 535 (1971) (noting that "Louisiana had created a statutory tort" for wrongful death). At a bare minimum, respondent's far more cramped definition is not "unavoidable," as would be necessary to expand the scope of the Tucker Act's sovereign-immunity waiver. *Cooper*, 132 S. Ct. at 1455 n.12.

2. Permitting FCRA suits under the Tucker Acts would also create a conflict with FCRA's native jurisdictional provision, 15 U.S.C. 1681p. As the government's opening brief explains (at 33-37), Section 1681p authorizes a FCRA suit "in any appropriate United States district court, without regard to the amount in controversy, *or* in any *other* court of competent jurisdiction" (emphasis added). Neither respondent nor the court of appeals disputes that Section 1681p *always* permits a FCRA plaintiff to go to district court, regardless how much recovery he seeks. The Tucker Acts, on the other hand, *never* permit a plaintiff with a claim over $10,000 to go to district court, but instead vest exclusive jurisdiction in the Court of Federal Claims. 28 U.S.C. 1346(a)(2), 1491(a)(1) (Supp. IV 2010). Because the different jurisdictional provisions cannot be merged without doing violence to one or the other, they should not be merged at all.

Respondent's attempts to reconcile the provisions are unavailing. He first contends that "[j]urisdiction in the district courts" is "available for all Tucker Act claims." Br. 30. If respondent means to suggest that any Tucker Act claim, regardless of amount, can be filed in district court, he wrongly severs the general Tucker Act's sovereign-immunity waiver from its exclusive grant of jurisdiction to the Court of Federal Claims. See U.S. Br. 37. Indeed, respondent himself acknowledges that "the general Tucker Act limits its waiver of sovereign immunity to actions filed

in the Court of Federal Claims." Br. 30. If he is instead simply pointing out that the Little Tucker Act allows district courts to hear Tucker Act claims up to $10,000, his point is correct but irrelevant. The conflict between Section 1681p and the general Tucker Act remains, and the Little Tucker Act's sovereign-immunity waiver reaches only the types of claims that the general Tucker Act's waiver also reaches. U.S. Br. 35; see *United States* v. *Sherwood*, 312 U.S. 584, 590-591 (1941); see also *id.* at 591 ("[W]e think that the Tucker Act did no more than authorize the District Court to sit as a court of claims.").

Respondent next contends (Br. 30-31), as did the court of appeals (Pet. App. 12a), that the Court of Federal Claims is an "other court of competent jurisdiction" in which Section 1681p would permit a FCRA suit. That contention simply looks past the fundamental conflict. Even accepting respondent's premise that the Court of Federal Claims is an "other court" in which a FCRA suit might lie, Section 1681p still *also* permits a suit of any amount in district court, whereas the Tucker Acts do not. Respondent's proposal that FCRA plaintiffs "may file in district court, but are limited to the Court of Federal Claims if they wish to recover more than $10,000" (Br. 31) cannot be squared with Section 1681p's categorical grant of FCRA jurisdiction to district courts. In any event, for reasons explained in the government's opening brief (at 36), interpreting the phrase "other court of competent jurisdiction" to include the Court of Federal Claims is circular, ahistorical, and contrary to how this Court has previously interpreted the phrase. Respondent's lone citation to a footnote in a 2006 claims-court decision (Br. 30) does not show otherwise.

Respondent finally contends (Br. 31) that there should be a presumption in favor of applying the Tucker Acts that would overcome the jurisdictional conflict. But respond-

ent's urging of such a presumption here is a product of his mistaken reliance, discussed at pp. 6-7, *supra*, on inapposite cases addressing whether particular statutes withdraw a previously recognized Tucker Act remedy under the Just Compensation Clause. In particular, the case he cites for the proposition that "even where Congress has directed claims to a special court, this Court has held that the Tucker Acts' remedies remain available" (Br. 31) addressed a Just Compensation Clause claim. See *Regional Rail Reorg. Act Cases*, 419 U.S. at 125-136. It did not address the issue here: whether the Tucker Act can provide a remedy for the violation of a statute that contains its own specific jurisdictional provision in conflict with the Tucker Act's.

3. Respondent also offers no justification for contriving a remedial scheme that excises FCRA's provision for punitive damages and abbreviates the normal Tucker Act statute of limitations. U.S. Br. 37-40. If this were an ordinary FCRA suit, it would permit recovery of punitive damages. 15 U.S.C. 1681n(a)(2). And if it were an ordinary Tucker Act claim against the federal government, the statute of limitations would be six years rather than two or five. Compare 28 U.S.C. 2401(a) (Supp. IV 2010), 28 U.S.C. 2501, with 15 U.S.C. 1681p. Respondent's a la carte remedy is inconsistent with both statutory schemes. Cases relied upon by respondent and the court of appeals, in which this Court has applied the narrower of two freestanding statutes of limitations, provide no authority for courts to pick and choose component parts of existing statutory remedies in order to infer both a waiver by Congress of the United States' sovereign immunity to suit and the creation of a new cause of action against the United States. See U.S. Br. 39 (discussing *United States* v. *Clintwood Elkhorn*

Mining Co., 553 U.S. 1 (2008), and *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941)).

III. CONGRESS DID NOT INTEND TO EXPOSE THE UNITED STATES TO DAMAGES ACTIONS UNDER FCRA

Respondent devotes the majority of his brief to the argument that FCRA's general civil-remedies provisions themselves expressly authorize suit against the United States. Br. 10-26. Even if that argument were correct, it would not support the Federal Circuit's assertion of jurisdiction over this case, because it would not suggest that the Tucker Acts are an appropriate vehicle for bringing a FCRA suit. Respondent's argument, however, is not correct. For reasons explained in the United States' opening brief (at 40-55), no fair inference, let alone any clear statement, of congressional intent to expose the United States to monetary liability can be drawn from FCRA's general civil-remedies provisions.

1. The key premise of respondent's argument is that the term "person" must be interpreted precisely the same way every place it appears in FCRA. Respondent suggests, for example (Br. 18-19), that because the United States is a "person" for purposes of a certain substantive FCRA provision, 15 U.S.C. 1681b(b)(3), it also must be a "person" for purposes of damages liability as well. But the "tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has or should have precisely the same scope in all of them, * * * has all the tenacity of original sin and must constantly be guarded against." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 n.8 (2004) (citation omitted); see, *e.g.*, *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001). As the Court has very recently reiterated, the identical-meaning assumption

"readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1360 (2012) (quoting *Cline*, 540 U.S. at 595).

Even when a statute provides a specific definition for a term, the precise interpretation of the term may still vary depending on context. Although the statutory definition typically controls, factors including the "creat[ion] of obvious incongruities in the language," *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949), or "constitutional concerns," *Northwest Austin Mun. Util. Dist. No. 1* v. *Holder*, 557 U.S. 193, 206-207 (2009) (*Northwest Austin*), can counsel in favor of contextual variations. See also, *e.g.*, *Philko Aviation, Inc.* v. *Shacket*, 462 U.S. 406, 412 (1983); *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 764 (1949); Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 20.8 at 135 & n.7 (7th ed. 2009). Indeed, the government's opening brief discusses a case, nowhere addressed by respondent, in which this Court declined to apply a statutory definition of the term "person" inflexibly. U.S. Br. 42-43 (discussing *United States* v. *Public Utils. Comm'n*, 345 U.S. 295 (1953)). The Court has additionally declined to apply a statutory definition of "employer" in the Fair Labor Standards Act that would have abrogated state sovereign immunity. See U.S. Br. 45-46 (discussing *Employees of the Dep't of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279 (1973)).

Respondent never directly addresses the government's argument (U.S. Br. 42-44) that Congress did not intend uniform application of 15 U.S.C. 1681a(b)'s definition of "person." He offers no explanation for why it would make

sense for the FCRA provision imposing criminal liability, including up to two years of imprisonment, on "person[s]" to apply to the United States (or States). See 15 U.S.C. 1681q. Nor does he explain why the FCRA provision authorizing suits by certain federal agencies against "person[s]" should be interpreted to permit intramural suits naming the United States or other federal agencies. See 15 U.S.C. 1681s(a) (Supp. IV 2010); 15 U.S.C. 1681s(c)(1); see also *United States* v. *Cooper Corp.*, 312 U.S. 600, 609 (1941) (finding it "obvious" that provisions imposing criminal and civil liability on "any person" did not include the United States).

In addition to those "obvious incongruities," *Lawson*, 336 U.S. at 201, respondent's argument that the term "person" always includes the United States, regardless where in FCRA it appears, would create "constitutional concerns," *Northwest Austin*, 557 U.S. at 207. Respondent does not dispute that his reading would necessarily include not only the United States, but also States, as potential defendants under FCRA's general civil-remedies provisions; that the civil-remedies provisions would thus represent an attempt by Congress to use its Commerce Clause authority to abrogate state sovereign immunity; or that this Court had held just months before FCRA was amended, in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), that Congress had no such Commerce Clause authority. U.S. Br. 46-47.

Although respondent argues (Br. 22-23) that the House of Representatives and the Senate originally approved bills containing the relevant language before this Court decided *Seminole Tribe*, the final version of the bill was passed six months after that decision. Compare *Seminole Tribe*, 517 U.S. at 44 (decided Mar. 27, 1996), with H.R. Rep. No. 863, 104th Cong., 2d Sess. 458 (Sept. 28, 1996) (conference

report); 142 Cong. Rec. 25,873-25,874 (Sept. 28, 1996) (House vote); *id.* at 26,736 (Sept. 30, 1996) (Senate vote). And respondent provides no evidence to support his implausible hypothesis (Br. 23) that, notwithstanding *Seminole Tribe*, Congress might have included States within the remedial provisions merely on the hope that they would voluntarily waive their sovereign immunity to FCRA suits. The much more reasonable interpretation, and the one required by traditional principles of constitutional avoidance, is that the term "person" in FCRA's general civil-remedies provisions should have its ordinary meaning, which would not include either States or the United States. U.S. Br. 45-46.

2. Respondent errs in comparing (Br. 19-21) FCRA's general civil-remedies provisions to the civil remedies available under the Truth in Lending Act (TILA) and the Equal Credit Opportunity Act (ECOA). First, contrary to respondent's assertion (Br. 20), the relevant remedial provisions of those statutes were not "enacted around the same time" as those in FCRA. They were enacted between 1968 and 1976, over 20 years before the 1996 amendment that expanded FCRA liability to include "persons." See *id.* at 20 n.2; TILA, Pub L. No. 90-321, Tit. I, §§ 103, 113, 130, 82 Stat. 147, 151, 157 (1968); ECOA, Pub. L. No. 90-321, Tit. V, sec. 503, §§ 702(f), 706, 88 Stat. 1522, 1524 (1974); Equal Credit Opportunity Amendments Act of 1976, Pub. L. No. 94-239, § 5, 90 Stat. 253-254; see also U.S. Br. 43-44. Congress thus was not yet aware of *Seminole Tribe* when it enacted those provisions.

Second, the inference respondent draws from TILA's and ECOA's limitations on governmental liability—that the absence of such limitations in FCRA means Congress intended unlimited FCRA suits against the United States—is backwards. The limitations in TILA and ECOA

demonstrate that Congress at least contemplated that the civil-remedies provisions of those statutes might be interpreted to apply to the United States. But no similar evidence of congressional contemplation of federal liability exists with respect to FCRA's general civil-remedies provisions. In fact, when Congress has wanted to subject an "agency or department of the United States" to liability under FCRA, it has done so expressly. 15 U.S.C. 1681u(i); see U.S. Br. 47-48; *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted).

3. Respondent does not dispute that his interpretation of FCRA would subject the United States to potentially billions of dollars of FCRA liability for acts (including merely negligent mistakes) arising out of routine and ubiquitous federal operations. U.S. Br. 50-55. Yet he cannot locate even a single statement by a single Member of Congress contemplating such a massive burden on the federal fisc. See *Quern* v. *Jordan*, 440 U.S. 332, 343 (1979) (declining to find waiver of state sovereign immunity where "not one Member of Congress" mentioned the issue or its "financial consequences"); see also *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 63 (2004) (finding "scant indication" in the legislative history that Congress meant TILA amendment to repeal longstanding statutory damages cap). He attempts to diminish the significance of that complete congressional silence by suggesting that such silence would be relevant only if offered "to establish that Congress intended to *retain* a statute's established meaning." Resp. Br. 25. But that is exactly how it is relevant here. The pre-1996 version of FCRA did not

impose liability on the United States (see U.S. Br. 42), and at least some Member of Congress, or some government witness testifying before Congress, would very likely have said something if a dramatic change to the status quo and a vast expansion of potential federal liability had been intended. See *Quern*, 440 U.S. at 343 ("[I]f in fact the Members of the 42d Congress believed that [the Civil Rights Act of 1871] overrode [state sovereign] immunity, surely there would have been lengthy debate on this point").

The legislative history's silence on the important question of federal liability is all the more telling when contrasted with the robust debate over the scope of federal liability under analogous provisions of the Privacy Act. U.S. Br. 48-50. The "United States' consent to suit" is "not lightly inferred" even under the Tucker Act, *Mitchell II*, 463 U.S. at 218, and should not be inferred here.

* * * * *

For the foregoing reasons and those stated in the United States' opening brief, the judgment of the court of appeals should be vacated and the case should be remanded with instructions that it be transferred to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted.

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Solicitor General

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